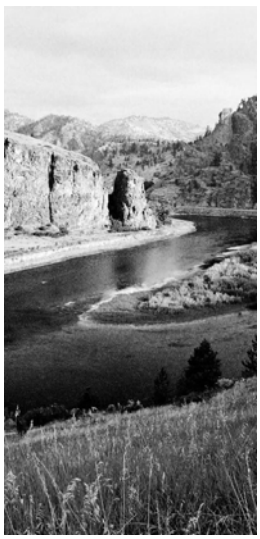
# Trust Land Management

An analysis of conservation easements and
other uses of state land



**House Joint Resolution No. 57 Study Report**
**to the 61st Montana Legislature**

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An analysis of conservation easements and other uses of state trust land

A Report to the 61st Legislature
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**House Joint Resolution No. 57 Study**
**Environmental Quality Council**


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# Introduction

Conservation easements and the management of state trust lands are established areas of Montana law. However, the selling of conservation easements on state trust lands—or any public land for that matter—is an issue much less explored.

A bill in the 2007 Legislature proposed amending the law to authorize the granting of conservation easements on any state lands held in trust. The measure died, but House Joint Resolution No. 57 directed a study of the issue. **(Appendix A)**

The resolution, in explaining the need for the study, stated that **Montanans value traditional uses of school trust lands, including grazing, farming, timber harvest, and general recreation**. It also pointed out that the trust lands are managed in part to provide revenue for the support of the common schools, the University System, and other state institutions and that efforts are being made to increase revenue by diversifying uses on the trust lands.

While selling of trust lands would raise revenue, the resolution stated that the traditional uses could be lost. On the other hand, it noted that **conservation easements are an effective tool available to protect these traditional uses while preserving the long-term value of trust lands**, retaining the trust land base, and raising revenue.

According to the resolution, the areas to be studied included:

- the effects of establishing conservation easements on state trust lands, including costs, benefits, compatibility with existing uses, and how to ensure that multiple-use management occurs in the future; and
- an evaluation of opportunities for the Department of Natural Resources and Conservation to partner with other organizations to acquire state trust lands that have restricted

development rights, which would lower land acquisition costs while also perpetuating traditional uses of the land.

In January of 2008, the EQC determined that other questions needed to be answered by the study, including:

- What is the State Land Board's and the DNRC's existing legal authority regarding conservation easements and similar dispositions of property interests on state trust lands? Is the DNRC requesting any additional authority?
- Can the beneficiaries of the state trust lands file suit to terminate an easement granted by the State Land Board to another party on state trust land?

# Findings & Recommendations

- **Study Task:** Evaluate the benefits to the various trusts of granting easements in terms of years and in perpetuity.
  - **Finding**: Under current law, limited easements for conservation purposes are allowed and would be granted in perpetuity.
  - **Finding**: Historically, other easements granted for conservation purposes have been granted in perpetuity.
  - **Finding**: Other types of easements have been granted in perpetuity or, in some cases, are terminated when the use is no longer valid.
  - **Finding**: The Land Board may issue leases for various purposes, including conservation, for up to 99 years.
  - **Finding**: Pursuant to 77-2-101(2), MCA, the Land Board may grant easements on trust land for uses defined as a public use, including natural areas, as defined in the eminent domain statutes, 70-30-102, MCA.
  - **Finding**: There is precedent that the Land Board may sell land for less than fee simple. It withholds mineral rights and, at least once, has restricted development rights. The sale of 640 acres in Powell County in 2007 restricted development to 25 lots.
  - **Finding**: A lease or a termed easement could be renegotiated. However, regardless of how the Land Board disposes of trust lands—including a termed easement, an easement in perpetuity, or a termed lease—the Land Board is obligated to obtain full market value and follow the incumbent legal constraints.
  - **Finding:** An easement granted in perpetuity would be considered a permanent disposition of trust lands, and 100% of the proceeds from the sale of an easement would be deposited in the permanent fund of the appropriate trust.
  - **Finding:** Permanent dispositions of lands held in trust for public buildings are distributed to the permanent trust for that grant; however, this revenue is distributed annually to the beneficiary for maintenance and support of the public buildings of the Capitol grounds.

- **Finding**: A limited-term easement is not a permanent disposition of trust land. The revenue from such an easement would be treated the same as revenue from a lease or licence and would be distributed to the beneficiary in the fiscal year in which it was received. However, should the temporary disposition be granted on lands held in trust for the benefit of common schools, 95% of the revenue is distributed to the income and distributable portion of the trust with the remaining 5% being deposited into the permanent common school trust.

- **Study Task:** Assess the alternatives with regard to appropriate entities to hold conservation easements on state trust land.
  - **Finding**: Pursuant to 77-2-101, MCA, only the Department of Fish, Wildlife, and Parks and certain nonprofit organizations may hold easements for conservation purposes on trust lands.
  - **Finding**: There are no restrictions on who may hold other types of easements on trust lands. Easements for conservation purposes are held by the Departments of Transportation and Fish, Wildlife, and Parks as well as the Custer Battlefield Preservation Committee, Inc.
  - **Finding**: Conservation easements on private land may be held by the state, counties, cities, towns, and other municipalities as well as by qualified private organizations. A qualified private organization is one that is competent to own interests in real property, that qualifies and holds a general tax exemption under the federal Internal Revenue Code, section 501(c), and whose organizational purposes are designed to further the open space purposes of Title 76, chapter 6, MCA.

- **Study Task:** Analyze how or if conservation easements can ensure that multiple-use management occurs.
  - **Finding**: The multiple-use management of trust lands is mandated by 77-1-203, MCA. It states that the Land Board shall manage state lands so that:
    - they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most

judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and

- harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.

- **Finding**: The multiple-use statute also states that subject to legal access and rules, state lands are open to recreational use.
- **Finding**: A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.
- **Finding:** Montana law requires that mineral rights be held in reserve by the state.
- **Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

- **Study Task:** Evaluate the effectiveness and cost or benefit to the various trusts of continuing traditional classified uses as part of the terms of a conservation easement.
  - **Finding**: A conservation easement sold on a piece of trust land that continued the traditional classified use would result in more revenue for the trust.
  - **Finding**: A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.

- **Finding:** As long as full market value is obtained and the incumbent legal constraints are followed, the Land Board may utilize several tools in the disposal of trust lands, including selling easements for various purposes and issuing leases.
- **Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

- **Study Task:** Determine options and alternatives for providing the continuance of recreational uses that were in place prior to an easement being granted.
  - **Finding**: The multiple-use management of trust lands is mandated by 77-1-203, MCA. It states that the Land Board shall manage state lands so that:
    - they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and
    - harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.
  - **Finding**: The multiple-use statute also states that subject to legal access and rules, state lands are open to recreational use.

- **Finding**: A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.
- **Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

- **Study Task:** Evaluate opportunities for the Department of Natural Resources and Conservation to partner with other organizations to acquire state trust lands that have restricted development rights, which would lower land acquisition costs while also perpetuating traditional uses of the land.
  - **Finding**: Montana law allows for the exchange of trust land with the federal government or tribal governments.
  - **Finding**: Montana law allows for the exchange of trust land with a political subdivision of the state, any other public body of the state, and nongovernmental agencies.
  - **Finding**: Montana law allows for land banking, a process of selling various parcels of state land and using the proceeds from the sales to purchase other land, easements, or improvements that are likely to provide greater or equal trust revenue, as may be reasonably expected over a 20-year accounting period with an acceptable level of risk, for the affected trust and to diversify the land holdings of the various trusts.
  - **Finding:** The Land Board has the authority under 77-1-213, MCA, to accept gifts or donations of land or other property and is obligated to manage the land for the benefit of the specific purposes designated by the person gifting the property. This could include conservation restrictions on the property.

- **Study Task:** What is the State Land Board's and the DNRC's existing legal authority regarding conservation easements and similar dispositions of property interests on state trust lands?
  - **Finding**: As long as full market value is obtained and the incumbent legal constraints are followed, the State Land Board and the DNRC have a number of tools at their disposal regarding trust land administration.
  - **Finding**: The Land Board has existing constitutional, Enabling Act, and statutory authority to transfer, lease, exchange, sell, dispose of, and retain state trust land property interests, provided that full market value for the property interest is obtained as required by the Montana Constitution and The Enabling Act.
  - **Finding**: The Land Board has the existing authority to sell an estate or interest in state trust land (i.e., for less than fee simple).
  - **Finding**: The Land Board has specific legal authority regarding the use of easements for conservation purposes or other public uses on state trust lands. The Land Board also has the authority to grant easements on state trust lands for natural areas under the Montana Natural Areas Act of 1974, Title 76, chapter 12, part 1.

- **Study Task:** Is the DNRC requesting any additional authority?
  **Finding:** No.

- **Study Task:** Can the beneficiaries of the state trust lands file suit to terminate the disposition of a property interest granted by the Land Board to another party?
  - **Finding:** Yes, the beneficiaries could file a lawsuit. However, assuming that the Land Board and the DNRC followed their trust management responsibilities and received full market value for the disposition, the success on the merits is unlikely given that the Montana Supreme Court held that the Land Board and the DNRC have large discretionary power in managing state lands.

- **Other findings and recommendations**
  - **Finding:** There is a need to further educate policymakers and the general public about the basics of conservation easements.

- **Recommendation:** The Environmental Quality Council should publish and make available a brochure explaining the basic provisions of conservation easements.

# An Overview: Trust Land Management

To begin to address the issues raised in HJR 57, it is necessary to provide an overview of state trust lands and conservation easements as they now exist in Montana as well as other conservation measures related to state trust lands.

The Enabling Act, passed by Congress in 1889, and subsequent **land grant acts gave Montana almost 6 million acres of land to be managed** for the benefit of common schools as well as other institutions, including colleges, a veteran's home, and a state reform school. (The Enabling Act is included in **Appendix B.**)

The state manages about 5 million acres of surface land and 6 million acres of mineral estate for the trusts. (The mineral acreage exceeds the surface total because the state retained mineral rights when land was sold).[1]

State land management is overseen by the Board of Land Commissioners. Known as the Land Board, the panel consists of the Governor, the Attorney General, the Secretary of State, the Auditor, and the Superintendent of Public Instruction. The Department of Natural Resources and Conservation (DNRC) is charged with the administration of trust lands.

In describing the management powers and duties of the Land Board, 77-1-202, MCA, states, in part:

> (1) In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:
>
> (a) secure the largest measure of legitimate and reasonable advantage to the state; and

[1] Department of Natural Resources and Conservation, 2006 annual report. http://dnrc.mt.gov/About_Us/publications/2006/dnrc06ar.pdf

(b) provide for the long-term financial support of education.

(2) It is consistent with the powers and duties provided in subsection (1) that the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation.

Today, **trust lands generate revenue from many sources, including grazing and agricultural leases, the mining of coal and gravel, drilling for oil and gas, logging, and leases for commercial, recreational, and residential uses.** Some lands generate revenue from more than one use. For example, trust land leased for a wind farm also is under a grazing lease. Surface land leased for grazing or agriculture may also generate revenue from mineral development. Many state lands managed for timber, grazing, or agriculture may also raise money though the sale of licenses that permit recreational use.

The multiple-use management of trust lands is mandated by 77-1-203(1), MCA. It states that the Land Board shall manage state lands so that:

(a) they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and

(b) harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.

The law also holds that, subject to legal access and rules, state lands are open to recreational use.

# Conservation Easements

Easements are generally thought of as acquiring a right to build a road, erect a power line, or bury a pipe on someone else's property. However, a conservation easement ***prohibits*** certain uses of the land. Property rights associated with land are often described as a bundle of sticks; one stick may represent surface uses such as building a home, another stick may be a water right, and another may be a mineral right.

In the case of a conservation easement, the property owner gives up the right to some future use the property. However, the forfeiting of that right still has value and can be sold.

As defined in 76-6-104, MCA, a conservation easement is "an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction".

The types of conservation easements are further explained in 76-6-203, MCA:

Easements or restrictions under this chapter may prohibit or limit any or all of the following:

(1) structures—construction or placing of buildings, camping trailers, housetrailers, mobile homes, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;

(2) landfill—dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials;

(3) vegetation—removal or destruction of trees, shrubs, or other vegetation;

(4) loam, gravel, etc.—excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance;

(5) surface use—surface use except for such purposes permitting the land or water area to remain predominantly in its existing condition;

(6) acts detrimental to conservation—activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat and preservation;

(7) subdivision of land—subdivision of land as defined in 76-3-103, 76-3-104, and 76-3-202;

(8) other acts—other acts or uses detrimental to such retention of land or water areas in their existing conditions.

**A landowner may sell or grant a conservation easement to a public body, such as a state or local government agency, or to a qualified private organization** defined by 76-6-104, MCA, as a private, nonprofit organization that aims to promote open space.

Conservation easements may be granted in perpetuity or for a term of at least 15 years, as specified by 76-6-202, MCA.

A recent audit of conservation easements by the Legislative Audit Division found that there are about 1,250 conservation easements in Montana covering more than 1.5 million acres of land, which represents less than 2% of Montana's acreage. Many conservation easements are held by private, qualified organizations, but government agencies, including the Department of Fish, Wildlife, and Parks (FWP), are also major holders of easements.[2]

[2] 2007 Performance Audit, Conservation Easements, http://leg.mt.gov/content/Publications/Audit/Report/06P-01.pdf

# Conservation Easements & Public Land

Almost 99% of the land in Montana that is under a conservation easement is owned by private parties. The remainder is divided among federal and tribal lands, state-owned lands, and local government property.[3]

In 2001, the Legislature passed Senate Bill No. 159, giving the Land Board limited power to grant certain easements for conservation purposes on state lands. As amended, the measure passed the House 99-1 and the Senate 46-1.

Section 77-2-101(1)(e), MCA, allows easements for conservation purposes on state lands to be granted:

> (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;
>
> (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
>
> (iii) to a nonprofit corporation for the Owen Sowerwine Natural Area located within section 16, township 28 north, range 21 west, in Flathead County.

According to testimony during the 2001 hearings, the DNRC director at the time said that the agency came up with the idea to sell conservation easements on particular parcels because they were within Wildlife Management Areas managed by the FWP and the habitat goals of FWP conflicted with the mandate of the DNRC to maximize revenue. **(Appendix C)**

To date, only the provision of 77-2-101, MCA, that allows an easement for conservation purposes to be granted to FWP has been exercised. An easement on about 6,800 acres in Missoula and Powell counties was granted in 2004 for $1.6

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[3] Ibid.

million. The purpose of the easement included protecting habitat for elk and deer, but stipulated that forestry and recreation also further the purpose of the easement. **(Appendix D)**

A legal opinion requested last year by Senator Aubyn Curtiss explores the legality of the law regarding conservation easements on state lands. **(Appendix E)**

Chief legislative attorney Greg Petesch cited 77-2-106, MCA, which requires the Land Board to charge and collect the full market value of the estate or interest disposed of through the granting of any easement and also fix, charge, and collect the amount of the actual damages resulting to the remaining land from the granting of an easement as nearly as the damages can be ascertained.

The Land Board may accept in-kind payments of services and materials equal to the full market value of any easement upon state trust land.

Petesch noted that while determining the value of "development rights" disposed of by granting a conservation easement may be difficult, the action is still legal. He wrote: "**So long as full market value for the conservation easement is received by the state, there is no constitutional impediment to granting a conservation easement on state land.**"

# Prior Legislation

This study was born out of legislation that failed in the 2007 session. Senate Bill No. 391 introduced by Senator Dan Weinberg, would have expanded the authority of the Land Board to grant conservation easements on state trust land. **(Appendix F)**

The measure passed the Senate, but died in the House. As amended, the bill would have:

- limited the conservation easements to 50 years or less;
- required the DNRC to reappraise the value every 10 years and adjust the payment;
- prohibited qualified nonprofits from holding conservation easements;
- reserved the mineral rights;
- required the Land Board to provide compelling evidence that the easement would comply with the multiple-use concept and allow traditional and recreational uses in place before the easement was granted; and
- limited the total acreage of state trust land placed under conservation easements to 25,000 acres.

The fiscal note estimated that conservation easements could be sold on about 900 acres of land a year, raising just more than $900,000 in additional trust revenue annually.

In 2005, Senator Greg Barkus carried a bill that would have allowed the Land Board to sell less than fee simple interest in state lands for the purpose of restricting rights to residential, commercial, and industrial uses. The measure, Senate Bill No. 97, would not have allowed the conveyance to restrict recreation, grazing, agricultural, or timber uses. The bill passed the Senate, but died in the House. The fiscal note predicted impacts similar to those listed in the 2007 bill. **(Appendix G)**

# Other Types of Easements

Changes to state law in 2001 specifically referenced easements for conservation purposes, although that term is not defined. However, prior to those changes, and continuing today, the **law also allows the Land Board to grant easements for public parks, community buildings, cemeteries, and other public uses.**

Furthermore, pursuant to 77-2-101(2), MCA, the Land Board may grant easements on trust land for uses defined as a public use in the eminent domain statutes under 70-30-102, MCA.

Besides the Blackfoot Clearwater conservation easement allowed by state law, 13 other easements on trust lands granted between 1963 and 2007 include conservation measures. All of the easements were granted in perpetuity. (**Appendix H**)

In the 1960s, the Fish and Game Commission bought easements for rights-of-way for public recreation and the management or conservation of wildlife. In granting these easements, the Land Board reserved the right to sell timber from the parcels because of fire damage or for any reason that the Land Board determined necessary to protect the resource. (An example of one of these deeds is included in **Appendix I.**)

In 1983, the Department of Fish, Wildlife, and Parks paid the state $34,375 for a right-of-way for a conservation easement on 268 acres on the Blackfoot River in Missoula County. The deed stated that the land was in a natural state, had significant ecological, scenic, and aesthetic values, and was an important part of the Blackfoot River system. The agreement provided for the continuation of historical uses, including timber management, livestock grazing, water use and development, and oil and gas leasing and development. However, it prohibited new roads and residences. **(Appendix J)**

In 1989, two "scenic" easements on two 320-acre parcels were sold to the Custer Battlefield Preservation Committee, Inc., for a total of $8,800. Both easements forbid any subdivision of the property or any structures except those for minimal agricultural improvements. The state stipulated that livestock grazing would be allowed as well as the prospecting and removal of minerals. (One of these easements is included in **Appendix K**.)

More recently, three easements were granted to the Department of Transportation for "wetland credit"—offsetting wetlands displaced by road building. The deeds prohibit grazing for 5 years and forbid surface removal of minerals, such as gravel. However, the state retained the rights to explore and extract minerals, such as oil or gas, so long as the activities do not occupy the easement area. (An example of one of these deeds is included in **Appendix L**.)

The Department of Fish, Wildlife, and Parks has also entered into a 5-year option to purchase an easement on trust land adjacent to Ulm Pishkin State Park.

# Conservation Leases & Licenses

The Land Board is authorized by 77-1-204, MCA, to lease trust lands for uses other than agriculture, grazing, timber harvest, or mineral production as long as the leases satisfy the Land Board's obligation to the trust and include multiple-use management.

In 2001, the Land Board issued a land use license to the Montana Audubon Society for a 442-acre parcel in Flathead County known as the Owen Sowerwine Natural Area. Two years after the Legislature passed the Montana Natural Areas Act of 1974 (Title 76, chapter 12, part 1), the parcel outside Kalispell was designated a natural area. That means "an area of land that must generally appear to have been affected primarily by the forces of nature with the visual aspects of human intrusion not dominant", which must also must have certain characteristics.

The required master plan for the area was adopted by the Land Board in 2003. Domestic livestock, most pets, motorized vehicles, bicycles, mining operations, and commercial enterprises are among things banned in the area. The license provides for an annual rental payment of $642 increasing 2% annually through February 2010, when the license expires. **(Appendix M)**

The Owen Sowerwine Natural Area is one of the three parcels eligible for an easement for purposes listed under 77-2-101, MCA.

In 1999, the DNRC issued five 20-year leases on about 12,000 acres of land known as the Snowcrest properties in Madison County. The property came under state trust land management in 1996 through a land exchange with Turner Enterprises. In addition to grazing and outfitting rights, bidders were able to submit proposals on precluding cabin site development. Four of the five winning bids included extra money to prevent cabin development.

# Easement Provisions in Montana & Other States

Other western states with significant amounts of trust land differ in the way their laws address conservation measures and easements on those trust lands.

**Common among states is the power to issue easements on trust lands**. Some states, such as Utah, Colorado, and Montana, specifically mention easements for conservation. Washington has the power to sell less than fee simple interest in trust lands for the creation of natural resources conservation areas, effectively the same thing as a conservation easement. Other states, such as Idaho and Wyoming, simply allow easements on trust lands for public uses. These could be interpreted to mean that the easement could be granted for conservation purposes, though that is not specifically stated.

Through law and rules, **most states require that full market value be obtained for easements or sales of interests in trust lands**.

Like Montana, some states specifically mention multiple use of state lands. In Utah, for example, the state reserves the right to explore for and develop minerals and use the land for other compatible uses.

Easements in Montana are granted in perpetuity or until the use for which the easement was issued is no longer valid. Other states choose to limit easement terms. Idaho limits easements to terms of 55 years. Wyoming may issue easements in perpetuity, but the preferred term is 35 years or less with an option to renew.

**Montana**

The Land Board may grant easements for conservation purposes in three specific instances on trust lands in Montana:[4]

[4] 77-2-101, MCA

- to the Department of Fish, Wildlife, and Parks for parcels that are surrounded by or adjacent to land owned by the Department of Fish, Wildlife, and Parks as of January 1, 2001;
- to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
- to a nonprofit corporation for the Owen Sowerwine Natural Area located within section 16, township 28 north, range 21 west, in Flathead County.

**The Land Board may grant easements for "other public uses" in addition to any public use as listed under the eminent domain statutes** in 70-30-102. One of those uses includes natural areas.

The minimum land value charge for a right-of-way easement is the market value of the area encumbered by the easement or $100 per section, whichever is greater.[5] Depending on the market conditions in the area where an application for an easement is made, the Department of Natural Resources and Conservation may perform an appraisal or set the charge according to a fee schedule.[6]

Easements may be granted in perpetuity or, in some cases, terminated when the easement use is no longer needed.[7]

Article X, section 11(2), of the Montana Constitution contemplates that an interest in state land may be sold as long as the full market value is obtained for that interest. In regard to easements, this is reflected in 77-2-106, MCA, which states that full market value must be obtained for an estate or interest disposed of through the granting of easement.

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[5] Administrative Rules of Montana, 36.2.1005

[6] Tom Schultz, DNRC, phone interview 10/22/07

[7] 77-2-105, MCA

The Land Board also has the power to sell state lands.[8] According to 77-2-304, MCA, the state must withhold the mineral interest. The Land Board also has limited development interests on a sale of state land. The sale of 640 acres in Powell County in 2007 restricted development to 25 lots.[9]

**Arizona**

The Department of State Lands may grant rights-of-way for any purpose it deems necessary on and over state lands, subject to terms and conditions the Department imposes. The Department may make rules respecting the granting and maintenance of such rights-of-way and sites.[10]

Rental or other payment for each right-of-way shall be determined by the commissioner after appraisal. Rights-of-way for exclusive use or perpetual in nature—except rights-of-way granted to governmental agencies of the state or political subdivisions and municipal corporations—shall be sold at public auction as provided under the laws for sale of state land after appraisal.[11]

Trust land may be sold for conservation purposes at a public auction based on one independent appraisal and one independent review appraisal, both of which may be reviewed by the department, of the fair market value of the trust land being offered. The appraisal may not reflect any conservation covenant that runs with the land in order to reduce the appraised value.[12]

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[8] 77-2-301, MCA

[9] Patent to State Land No. F-0068. Approved by Board of Land Commissioners Sept. 17, 2007. Based on Land Banking Sale #376

[10] Arizona Revised Statutes, 37-461

[11] Arizona Rules, R12-5-801

[12] Arizona Revised Statutes, 37-314

## Colorado

The State Board of Land Commissioners may sell or lease conservation easements, licenses, or other similar interests in land in accordance with the provisions of sections 9 and 10 of Article IX of the Colorado Constitution.[13]

The Constitution states that trust lands are an asset that should not be significantly diminished and that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. Management should produce "reasonable and consistent income".[14]

The Board sets a minimum bid for sales of state lands.[15]

State law also allows for rights-of-way across or upon any portion of state land for various uses including "any lawful use or purpose". A right-of-way may be granted to any person or to any local, state, or federal government agency. The Board determines the terms. However, when rights-of-way granted cease to be used for those purposes, the rights-of-way terminate, and all rights revert to the state or its successors in interest.[16]

## Idaho

State law allows easements for any public or private purpose or beneficial use.[17]

The term of an easement may be from 10 to 55 years. For highways, roads, railroads, reservoirs, trails, canals, ditches, or any other improvements that require long-term, exclusive, or near-exclusive use and occupation of the right-of-way, the compensation is up to 100% of land value plus payment for any damage or impairment of rights to the remainder of the property as determined by the

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[13] Colorado Revised Statutes, 36-1-150

[14] Colorado Constitution, Article IX

[15] Colorado Revised Statutes, 36-1-124

[16] Colorado Revised Statutes, 36-1-136

[17] Idaho Code, 58-603

director and supported by specific data such as an appraisal. The Director of the State Lands Department may grant easements under $25,000 in value.

### New Mexico

State law allows for easements and rights-of-way granted over, upon, through, or across trust lands for a variety of uses including "other purposes". The price is fixed by the Commissioner of Public Lands.[18] Through administrative rule, the price is determined by field inspection or appraisal and/or subsequent negotiation or such other method as the Commissioner deems best. The price may not be less than the fair market value of the interest to be granted. Easements are granted by a term deemed in the best interests of the trust, but may not be granted in perpetuity.[19]

The state's Enabling Act allows for sales of interests in state lands to the highest and best bidder at a public auction. The land or interest must be appraised at its true value, and no sale or other disposal may be made for a consideration less than the value.[20]

### Oregon

The State Land Board shall manage trust lands for the greatest permanent value while giving due consideration in the sale, exchange, or leasing of any state lands to the protection and conservation of all natural resources, including scenic and recreational resources, so as to conserve the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic, and animal life.[21]

The Division of State Lands must seek to obtain the full fair market value interests in land sold or exchanged. Public review and State Land Board approval of proposed land sales must be sought at key decision points as determined by the

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[18] New Mexico Statutes, 19-7-57

[19] New Mexico Administrative Code, 19.2.10

[20] Enabling Act for New Mexico, Section 10.

[21] Oregon Revised Statutes, 273.051

Director. The criteria for evaluating any land sale must include the current and future estimate of value and income potential; location, accessibility, and manageability; the potential for alternative income-generating uses; and the level and intensity of expressed interest in a sale, exchange, or purchase.[22]

Easements may be issued for uses and developments that limit the full use or development of state-owned land. Compensation must be the greater of 100% of the fair market value of the area requested for the easement, $250, or the highest comparative compensatory payment. Easements may be issued for less than 10 years, for 10 to 30 years, or in perpetuity.[23]

**Utah**

The Director of the School and Institutional Trust Lands Administration shall establish criteria by rule for the sale, exchange, lease, or other disposition or conveyance of trust lands, including procedures for determining fair market value of those lands.[24] The Director also shall establish rules for the issuance of easements on, through, and over any trust land and may establish price schedules.[25]

The School and Institutional Trust Lands Administration may issue exclusive, nonexclusive, and conservation easements on trust lands when the agency deems it consistent with trust responsibilities. Price schedules are based on the cost incurred by the agency in administering the easement and the fair market value of the particular use. Easement terms are usually not longer than 30 years. Longer or shorter terms may be granted upon application if the director determines that such a grant is in the best interest of the trust beneficiaries.[26]

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[22] Oregon Revised Statutes, 141-067-140

[23] Oregon Administrative Rules, 141-122

[24] Utah Code Annotated, 53C-4-101

[25] Utah Code Annotated, 53C-4-203

[26] Utah Administrative Code, R850-40

Each easement must contain provisions necessary to ensure responsible surface management, including reservation for mineral exploration and development and other compatible uses. For conservation easements, the easement must specify the resources being protected and the conditions under which the conservation easement may be terminated.[27]

To sell lands, the agency must contract for an appraisal to estimate the fair market value of the trust land. The appraisal is paid for by the purchaser. The cost of the appraisal must be borne by the successful purchaser of the parcel. An economic analysis of the proposal done by the agency must include the appraisal, an assessment of real estate trends, market demand, opportunity costs (including potential for appreciation) and associated management costs of retention. Trust land may be sold at public auction or in some cases with approval from the School and Institutional Trust Lands Board of Trustees.[28]

**Washington**

The Department of Natural Resources may grant the same easements and rights in public lands that an applicant might acquire in privately owned lands. Grants must secure full market value of the estate or interest.[29]

State lands are to be managed for multiple-use, defined as providing for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership. That would include such things as timber harvesting and maintaining scenic areas.[30]

However, the Department may purchase, lease, set aside, or exchange any public lands that are deemed to be natural areas, provided that the appropriate state land trust receives the fair market value for any interests that are disposed of and that transactions are approved by the Board of Natural Resources. An area

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[27] Ibid.

[28] Utah Administrative Code, R850-80

[29] Revised Code of Washington, 79.36.355

[30] Revised Code of Washington, 79.10.110 and 79.10.120

consisting of public land designated as a natural area preserve must be held in trust and not alienated except to another public use upon a finding by the Department of Natural Resources of imperative and unavoidable public necessity.[31]

The Department may transfer fee simple interest or less than fee simple interests in trust land for the creation of natural resources conservation areas to be managed by the Department provided that fair market value compensation for all rights transferred is obtained. Proceeds must be used for the exclusive purpose of acquiring real property to replace those interests utilized for the conservation area in order to meet the Department's fiduciary obligations and to maintain the productive land base of the various trusts.[32] The Department shall determine what management activities are suitable for the natural resource conservation area. Such activities may include forestry, agriculture, or other resource management activities if they are consistent with the other purposes and requirements of the law.[33]

**Wyoming**

The Board of Land Commissioners may grant permanent rights-of-way or easements on state lands for railroads, highways, or "other public conveyances".[34] As further explained in agency rules, easements may also be issued for open space and "any appropriate use".[35]

The Board may grant easements in perpetuity or for any term of years, although the rules state that whenever possible and practical, and consistent with the purpose, easements should be issued for terms of 35 years or less with an option to renew.[36]

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[31] Revised Code of Washington, 79.70.040

[32] Revised Code of Washington 79.71.050

[33] Revised Code of Washington 79.71.030

[34] Wyoming Statutes, 36-9-118

[35] Wyoming Rules and Regulations, Chapter 3, Section 3

[36] Wyoming Rules and Regulations, Chapter 3, Section 4

Payment for easements may be negotiated, but must be at least $250 or market value, whichever is greater. These rules apply to all federal, state, county, municipal, or other governmental agencies as well as quasi-governmental bodies or organizations the same as if they were private parties.[37] The Board must give its final approval for easements.[38]

State land must be sold at public auction to the highest responsible bidder after being appraised by the Board. The sale must be for at least the appraised value, but not less than $10 per acre.[39]

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[37] Wyoming Rules and Regulations, Chapter 3, Section 6

[38] Wyoming Rules and Regulations, Chapter 3, Section 7

[39] Wyoming Statutes, 36-9-102

# A Legal Analysis of Land Board Authority

At the January 15, 2008, EQC meeting, several questions were raised regarding the authority of the State Land Board and the Department of Natural Resources and Conservation (DNRC) with respect to conservation easements and similar property interest dispositions on state trust lands.

The Council specifically requested a legal analysis by EQC attorney Todd Everts.

**QUESTION #1: WHAT IS THE STATE LAND BOARD'S AND THE DNRC'S EXISTING LEGAL AUTHORITY REGARDING CONSERVATION EASEMENTS AND SIMILAR DISPOSITIONS OF PROPERTY INTERESTS ON STATE TRUST LANDS? IS THE DNRC REQUESTING ANY ADDITIONAL AUTHORITY?**

**Overview and Analysis of Existing Legal Authority**

In order to understand the legal authority vested in the State Land Board (the Board) and the DNRC regarding conservation easements and the disposition of similar property interests, it is necessary to review and analyze The Enabling Act, the Montana Constitution, applicable statutory provisions, and relevant case law.

***Historical Context***

In the golden year of 1889, Montana was admitted into the Union under the Omnibus Enabling Act of 1889.[40] Upon admission, Congress granted Montana the sixteenth and thirty-sixth sections of each township within Montana "for the support of common schools".[41] Montana also received additional grants of acreage for other educational and state institutions. According to the DNRC, total trust land acreage has fluctuated over the years due to land sales and acquisitions, but as of fiscal year 2007, the trust land surface acreage totals

[40] The Enabling Act, chapter 180, 25 Stat. 676 (1889)

[41] Ibid, section 10

more than 5.1 million acres and the mineral acreage is in excess of 6.2 million acres.[42]

### *Fiduciary Responsibilities*

The Enabling Act, in tandem with the Montana Constitution, imposes fiduciary responsibilities on the state with regard to state trust land. In 1999, the Montana Supreme Court, in a seminal case, provided the overarching framework for those fiduciary responsibilities.[43] The Court held that the federal grant of lands to Montana constituted a trust. The terms of the trust are set forth in the Montana Constitution and The Enabling Act. Montana's 1889 Constitution accepted the lands from the federal government and provided that those lands would be held in trust consonant with The Enabling Act, and the 1972 Montana Constitution continued those terms. The State of Montana is the trustee of those lands. The State Land Board is the instrumentality created to administer that trust and is bound upon principles that are elementary in order to secure the largest measure of legitimate advantage to the beneficiary. The Board owes a higher duty to the public than does an ordinary businessman. Montana's constitutional provisions are limitations on the power of disposal by the Legislature. One limitation on the Legislature in the power of disposal is the trust's requirement that full market value be obtained for trust lands.

The Montana Supreme Court has also held that the state, as the trustee, has an undivided loyalty to the beneficiaries of the trust.[44] The Court noted that:

> When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts which require a standard with a "punctilio of an honor the most sensitive." A trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person.[45]

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[42] DNRC Trust Land Management Division Fiscal Year 2007 Annual Report, page 1

[43] Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 (1999)

[44] Wild West Motors, Inc. v. Lingle, 224 Mont. 76, 728 P.2d 412 (1986)

[45] Ibid.

The Court has also determined that the Board and the DNRC must have large discretionary power in managing state trust lands,[46] but that discretionary power is not unlimited and it must conform to the trust[47] and must be consistent with the Constitution.[48]

### *Trust Land Administration and Management*

The Board has the constitutional authority "to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law".[49] The Montana Constitution sets out the Board's authority regarding public trust land disposition:

> **Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.
>
> (2) No such land 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.
>
> (3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

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[46] State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916)

[47] Toomey v. State Board of Land Commissioners, 106 Mont. 547, 81 P.2d 407 (1938)

[48] State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966)

[49] Article X, section 4, of the Montana Constitution

> (4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.[50]

In addition, The Enabling Act also lays out some terms and conditions regarding state trust land disposition, including the following:

- that all lands granted by the act be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre;

- the lands may be leased under such regulations as the legislature may prescribe; and

- the State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by the Act, as may be acquired in privately owned lands through proceedings in eminent domain; provided, however, that none of the lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor 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.[51]

The Montana Supreme Court has ruled that The Enabling Act must be liberally construed with the view of accomplishing the object sought to be attained.[52] The Court has also held that The Enabling Act contemplates that "an interest or estate less than the fee may be leased or disposed of".[53]

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[50] Article X, section 11, of the Montana Constitution

[51] Section 11 of The Enabling Act (as amended by the acts of May 7, 1932, Ch. 172, 47 Stat. 150 (1932) and October 16, 1970, Pub. L. No. 463, 84 Stat. 987 (1970))

[52] State ex rel. Morgan v. State Board of Examiners, 131 Mont. 188, 309 P.2d 336 (1957), overruling Bryant v. State Board of Examiners, 130 Mont. 512, 305 P.2d 340 (1956)

[53] State ex rel. Hughes v. State Board of Land Commissioners, 137 Mont. 510, 353 P.2d 331 (1960)

Statutorily, the Legislature has outlined the powers and duties of the Board expressly authorizing the Board to "exercise general authority, direction, and control over the care, management, and disposition of state lands".[54] Under the direction of the Board, the DNRC is charged with the administration of state trust lands.[55] The "guiding principle" in the administration of Montana's trust lands is that "these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act".[56] The Board is required to administer the state trust lands to secure the largest measure of legitimate and reasonable advantage to the state and provide for the long-term financial support of education.[57] It is consistent with the powers and duties of the Board that "the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation".[58]

The Board is also required to manage state lands under the multiple-use management concept.[59] The law requires that:

> (1) The board shall manage state lands under the multiple-use management concept defined as the management of all the various resources of the state lands so that:
>
> > (a) they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and
> >
> > (b) harmonious and coordinated management of the various resources, each with the other, will result without

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[54] 77-1-202, MCA

[55] 77-1-301, MCA

[56] 77-1-202, MCA

[57] Ibid.

[58] Ibid.

[59] 77-1-203, MCA

> impairment of the productivity of the land, with consideration being given to the relative values of the various resources.[60]

The Montana Supreme Court has held that income is "a" consideration, but not "the" consideration regarding school trust lands and that maximizing income is not paramount to the exclusion of wildlife or environmental considerations.[61]

The Board also has general authority on behalf of the state to accept gifts, donations, grants, legacies, and devices.[62] The Board is required to manage the gifted lands and other property for the benefit of the specific purposes designated by the person gifting the property.[63] The Board may also accept gifts, donations, or contributions of land suitable for forestry or park purposes and enter into agreements with the federal government or other agencies for acquiring by lease, purchase, or otherwise those lands that are desirable for state forests.[64]

### *Leases, Sales, Exchanges, and Reservations of State Trust Land Property Interests*

The Board may lease state trust lands for up to 99 years for uses other than agriculture, grazing, timber harvest, or mineral production under the terms and conditions that best fulfill the duties and obligations of the Board to the trust, including multiple-use management.[65]

The Board may sell state land subject to certain limitations and if it is in the best interests of the state.[66] State law includes restrictions on land available for sale, including land likely to contain valuable mineral deposits or certain state land

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[60] Ibid.

[61] Ravalli County Fish & Game Association, Inc. v. Department of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995)

[62] 77-1-213, MCA

[63] Ibid.

[64] 77-1-214, MCA

[65] 77-1-204, MCA

[66] 77-2-301, MCA

bordering on navigable lakes, nonnavigable meandered lakes, and navigable streams.[67] The Board is also required, when selling any state land, to reserve certain mineral rights.[68]

The Board may exchange land with the United States, tribal governments, a nongovernmental entity, state government, and other state and local public entities subject to certain statutory restrictions.[69]

The Board clearly has the right, as any property owner would, to reserve and retain property interests when disposing of property.

### *Easements*

The Board has the statutory authority to grant certain types of easements on state lands for certain purposes. However, it is necessary to highlight some of the subtle distinctions between what may be termed "traditional" easements and conservation easements allowed under state law.

Traditional Easements

The Montana Supreme Court has held that an easement is a "right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon land".[70] Stated another way, an easement is a grant of the use of and not a grant of title to land.[71] Under Montana law, an easement is consider to be a "burden"or "servitude" attached to land.[72]

Statutorily, there are 20 listed servitudes, ranging, for example, from the traditional right-of-way, to the right of conserving open space to preserve park, recreation, historic, aesthetic, cultural, and natural values on or related to land,

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[67] 77-2-303, MCA

[68] 77-2-304, MCA

[69] Title 77, chapter 2, part 2, MCA

[70] Laden v. Atkeson, 112 Mont. 302, at 305, 116 P.2d 881 (1941)

[71] Legal Memorandum by Greg Petesch to the Eminent Domain Subcommittee of the Environmental Quality Council regarding the additional use of easement acquired through eminent domain (March 15, 2000)

[72] 70-17-101, MCA

or to using land adjacent to a firearms shooting range as a range safety zone.[73] The extent of the servitude is "determined by the terms of the grant or the nature of the enjoyment by which it was acquired".[74] The Montana Supreme Court has also stated that "an easement is a property right protected by the constitutional guarantees against the taking of private property without just compensation".[75]

Conservation Easements

Although the term "conservation easement" is not defined in the state land management statutes under Title 77, chapter 1, of the Montana Code Annotated, it is defined within the Montana Open-Space Land and Voluntary Conservation Easement Act (hereafter Conservation Easement Act) to mean:

> an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.[76]

In addition, if a public body (state, county, city, town, or other municipality) acquires an interest in land under the provisions of the Conservation Easement Act that is less than fee simple, this acquisition is considered to be a conservation easement.[77]

Permissible conservation easements include easements or restrictions that may prohibit or limit the following:

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[73] 70-17-101(4), (18), (20), MCA

[74] 70-17-106, MCA

[75] City of Missoula v. Mix, 123 Mont. 365, at 370, 214 P.2d 212 (1950)

[76] 76-6-104(2), MCA

[77] 76-6-201, MCA

(1) structures--construction or placing of buildings, camping trailers, housetrailers, mobile homes, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;

(2) landfill--dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials;

(3) vegetation--removal or destruction of trees, shrubs, or other vegetation;

(4) loam, gravel, etc.--excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance;

(5) surface use--surface use except for such purposes permitting the land or water area to remain predominantly in its existing condition;

(6) acts detrimental to conservation--activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat and preservation;

(7) subdivision of land--subdivision of land as defined in 76-3-103, 76-3-104, and 76-3-202, MCA;

(8) other acts--other acts or uses detrimental to such retention of land or water areas in their existing conditions.[78]

A conservation easement may be granted either in perpetuity or for a term of years.[79] A property owner may sell or grant a conservation easement to a public body or to a private qualified organization.[80]

Subtle Distinctions Between Traditional Easements and Conservation Easements

As the Montana Supreme Court has noted, an easement in the traditional sense is the right of one person to use the land of another for a specific purpose or, stated another way, it is a servitude imposed as a burden on the land.[81] A

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[78] 76-6-203, MCA

[79] 76-6-202, MCA

[80] 76-6-106 and 76-6-204, MCA

[81] City of Missoula v. Mix, at #36.

conservation easement, however, does not grant a use of land, but prohibits certain uses of land through the voluntary relinquishment (i.e., sale between willing parties) by a landowner to the easement holder of certain property rights. Stated another way, "a conservation easement may be described as the sale of the right to change the existing use of land or a sale of the right to develop the land".[82]

Easements on State Trust Lands

The Board has the statutory authority to grant certain types of easements on state lands for certain purposes.[83] The Board may grant easements for purposes such as schoolhouse sites and grounds, public parks, community buildings, cemeteries, conservation purposes, and other public uses.[84] Easements granted for "conservation purposes" under the provisions of 77-2-101(1)(e), MCA, may be specifically granted:

> (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;
>
> (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
>
> (iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township 28 north, range 21 west, in Flathead County.

The Board also may grant easements on state land for rights-of-way and other uses defined as a public use in the eminent domain statutes.[85]

It is noteworthy that an easement for "conservation purposes" is not defined within the trust land administration statutes. It is also noteworthy that there are

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[82] See Appendix E, a legal memorandum from Greg Petesch to Senator Curtiss regarding the legality of conservation easements on school trust lands (March 29, 2007)

[83] 77-2-101, MCA

[84] 77-2-101(1), MCA

[85] 77-2-101(2), MCA

numerous examples of easements being granted on state trust lands that include conservation measures.

The Board is also required to grant to the state a conservation easement for cabin sites, home sites, or city or town lots that are to be sold as provided under state law.[86] The conservation easement is required to run with the land in perpetuity and must:

> (1) prohibit subdivision of the land, lake, or stream;
> (2) for property within 100 feet of a river, stream, or lake, prohibit the cutting of trees except as necessary for construction on the lot, fire prevention, safety, or protection of personal property; and
> (3) require that any permanent structure be set back 25 feet from the high-water mark of a lake or stream.[87]

Under the Montana Natural Areas Act of 1974,[88] the Board may grant an easement or acquire property interests, including gifted conservation easements for the establishment of natural areas.[89] A natural area is defined as:

> An area of land that must generally appear to have been affected primarily by the forces of nature with the visual aspects of human intrusion not dominant and also must have one or more of the following characteristics:
> (a) an outstanding mixture or variety of vegetation, wildlife, water resource, landscape, and scenic values;
> (b) an important or rare ecological or geological feature or other rare or significant natural feature worthy of preservation for scientific, educational, or ecological purposes.[90]

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[86] 77-2-318, MCA

[87] 77-2-319, MCA

[88] Title 76, chapter 12, part 1

[89] 76-12-107 and 76-12-108, MCA

[90] 76-12-104(3), MCA

***Some Concluding Thoughts on Existing Legal Authority***

When all is said and done, as long as full market value is obtained and the incumbent legal constraints are followed, the Board has the following tools at its disposal regarding trust land administration that are relevant to the HJR 57 Study:

(1) The Board has the authority to sell an estate or interest in state trust lands. This interest could include (and has included in some of the Board's past transactions) the sale of development rights. This authority includes the ability to sell/retain an estate or interest in perpetuity.

(2) The Board has the authority to retain an estate or interest in state trust lands. This interest could include (and has included in some of the Board's past transactions) the retention of development rights.

(3) The Board has the authority to grant an easement for "conservation purposes" (undefined in the statute) pursuant to 77-2-101(1)(e), MCA. The Board also has the authority to grant an easement for "other public uses" under 77-2-101(1)(f).

(4) The Board has the authority to grant easements on state trust lands for natural areas under the Montana Natural Areas Act of 1974.
(5) The Board is required to grant to the state, conservation easements for certain cabin sites and home sites under 77-2-318, MCA.

(6) The Board has the authority, under 77-1-213, MCA to accept gifts or donations of land or other property and is obligated to manage the land for the benefit of the specific purposes designated by the person gifting the property. This could include conservation restrictions on the property.

(7) The Board has the authority, under 77-1-204, MCA, to lease trust lands for up to 99 years for uses that could, and have included, conservation uses.

(8) The provisions of the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, part 1, MCA, specifically include public bodies.

**Additional Authority Being Requested by the DNRC?**

DNRC Director Mary Sexton said that DNRC is not requesting any additional authority regarding conservation easements and similar dispositions of state trust land property interests at this time.

**QUESTION #2: CAN THE BENEFICIARIES OF THE STATE TRUST LANDS FILE SUIT TO TERMINATE THE DISPOSITION OF A PROPERTY INTEREST GRANTED BY THE STATE LAND BOARD TO ANOTHER PARTY?**

The answer to this is "yes", the beneficiaries could file a lawsuit. However, assuming that the Board and the DNRC followed their trust management responsibilities and received full market value for the disposition, the success on the merits is unlikely given that the Montana Supreme Court held that the Board and the DNRC have large discretionary power in managing state lands.[91]

[91] City of Missoula v. Mix, #7.

# Conservation Easement Brochure

During the course of the HJR No. 57 study of conservation easements on school trust lands, the EQC determined that in some circles, there is a need for more information about the provisions of conservation easements in general. The EQC directed staff to draft a brochure that would be printed and distributed by the EQC.

The draft version follows.

## Conservation Easements: 20 Things Everyone Should Know

**What is a conservation easement?**

A conservation easement is a voluntary legal agreement that limits the use of property. Property ownership comes with many rights. Most of them deal with using the land in some way— farming, logging, or subdividing, to name a few. A property owner also has a right to limit the use of the land. In the case of a conservation easement, a property owner may sell or donate a right, such as the right to develop, and be compensated for restricting or forfeiting that right while still maintaining ownership of the land.

**What is the purpose of a conservation easement?**

Typically, the purpose is to preserve property in its current, undeveloped state. Conservation easements may prohibit or limit such things as subdivision, excavation, or acts detrimental to conserving the natural values of the property.

**Who may sell or donate a conservation easement?**

Any landowner whose property fulfills the requirements of a conservation easement may sell or donate a conservation easement. Typically, conservation easements are placed on large areas of open land.

**Who may buy or hold a conservation easement?**

Any public body, such as a state or local government agency, or any nonprofit organization that is competent to own property, holds federal tax-exempt status under

the Internal Revenue Code, and conserves open space as part of its mission may buy or hold a conservation easement.

**Who negotiates a conservation easement?**

A conservation easement is negotiated by a willing landowner and a public body or qualified organization.

**Does a conservation easement on a farm or ranch mean no more agricultural operations or timber harvesting?**

No. Since the goal of many conservation easements is to preserve open space, historic agricultural operations and other uses often continue. The land is still owned and managed by the party that sold or donated the conservation easement. The terms of the conservation easement, including what may and what may not occur on the land, are negotiated between the landowner and the public body or organization holding the easement.

**Do conservation easements have anything to do with eminent domain, condemnation, or wilderness areas?**

No.

**Does a conservation easement mean the that public can access the land?**

No. The landowner retains control of the property. However, public access may be part of the voluntary negotiated agreement.

**How long do conservation easements last?**

Montana law requires a conservation easement to be granted for a term of at least 15 years, but many are granted in perpetuity. According to state law, a conservation easement runs with the land and remains in place even if the land is sold.

**How long is perpetuity?**

Forever.

**Why would someone give up a property right forever?**

A landowner may want to know that the land will always be protected. Also, the easement must be in perpetuity to qualify for federal income tax and estate tax benefits. This is a way to guard against speculators who could receive a federal tax deduction for decades until the land rises in value and then subdivide it when the easement expires.

**How does the federal tax break work?**

The tax deduction for conservation easements is based on the potential for an easement to result in a reduced land value, and the amount of that reduced value is then considered a charitable contribution. This occurs whether the easement is sold or donated. The donation must meet three conditions:

1. It must be granted in perpetuity.
2. It must donated or sold to a qualified organization, such as a government agency or a non-profit land trust.
3. It must be made for conservation purposes including preservation of land use by the public for outdoor recreation or education, protection of wildlife habitat, preservation of farm or forest land for the public's scenic benefit or as part of a governmental conservation policy, or preservation of historic landscapes or buildings.

**Is there a state tax break for conservation easements?**

Montana does not provide property tax incentives for creating conservation easements. The law seeks to ensure that the creation of conservation easements is fiscally neutral for local governments. If an easement prohibits all farming on land classed for tax purposes as agricultural, the property would be reassessed. The assessed value of the land may not fall below the value it held in 1973. Finally, land cannot be reclassified solely on the basis of an easement; other changes in the land use must be taken into account. However, a grantor of an easement may claim a state income tax deduction for the charitable contribution.

**If a conservation easement is placed on state or federal land, is there a tax break?**

No. Government agencies do not pay taxes, so there would be no tax deduction.

**How is the value of a conservation easement determined?**

The value is determined by an appraiser. To qualify for the federal tax break, a landowner must secure a subordination of any mortgage or contract holders, procure an appraisal, and ensure that mineral right ownership does not inhibit the placement of the conservation easement.

**Does a conservation easement reduce the fair market value of the land?**

Typically, yes. A parcel of land may be worth more as a subdivision than as open agricultural land. The federal tax deduction is meant to offset this reduced land value.

**Who enforces the terms of the conservation easement?**

Representatives of the public body or organization that holds the conservation easement may enter the land in a reasonable manner at reasonable times to ensure compliance.

**What happens if land under a conservation easement is sold or passed on to heirs?**

The conservation easement runs with the land and would stay in place. According to state law, a conservation easement runs with the land and remains in place even if the land is sold.

**How many conservation easements are there in Montana?**

A 2007 legislative audit found that there are about 1,250 conservation easements covering more than 1.5 million acres of land, which represents less than 2% of Montana's acreage. Almost 99% of the land under conservation easements is owned by private parties. Many conservation easements are held by nonprofit land trusts, but government agencies, including the Montana Department of Fish, Wildlife, and Parks, are also major holders.

**Who keeps track of conservation easements?**

Conservation easements are recorded at the Clerk and Recorder's Office in the county where the land lies. Sometime in 2008, information about all conservation easements filed in Montana should be available through the state Natural Resource Information System.

<u>This guide provides a general overview of conservation easements. It is not a substitute for consulting state and federal laws or seeking legal counsel.</u>

# Conservation Easement Work Plan Tasks

X 1. Review history of trust lands and conservation easements, legislative history of current trust land conservation easement law, and legal opinion regarding conservation easements on state trust land.

Who: EQC staff
Timeline: September 2007 meeting

X 2. Summary of Legislative Audit report on conservation easements.
Who: Angus Maciver, Legislative Audit
Timeline: September 2007 meeting

X 3. Overview of real estate management on school trust lands, including conservation easements.

Who: Tom Schultz, Trust Land Administrator, DNRC
Timeline: September 2007 meeting

X 4. Overview of conservation easements in Montana.

Who: Angus Maciver, Legislative Audit
Timeline: September 2007 meeting

X 5. EQC discussion and study direction.

Who: EQC members
Timeline: September 2007 meeting

X 6. Summary of other state laws regarding conservation easements on state trust lands.

Who: EQC staff
Timeline: January 2008 meeting

X 7. Panel discussion from stakeholders.

Who: Ellen Engsted-Simpson, Montana Wood Products Association
Janet Ellis, Montana Audubon Society
Timothy Ravendall, Montanans for Multiple Use
Glenn Marx, Montana Association of Land Trusts
Jay Bodner, Montana Stockgrowers Association
Timeline: January 2008 meeting

X 8. EQC discussion and study direction.

Who: EQC members
Timeline: January 2008 meeting

X 9. Presentation of requested legal analysis.

Who: EQC staff
Timeline: March 2008 meeting

X 10. Presentation of requested brochure.

Who: EQC staff
Timeline: March 2008 meeting

X 11. Review draft report, brochure, and any proposed legislation.

Who: EQC staff
Timeline: May 2008 meeting

X 12. Review public comment on draft report and any proposed legislation.

Who: EQC staff
Timeline: July 2008 meeting

X 13. Approval of final report and any findings, recommendations, or legislation.

Who: EQC members
Timeline: September 2008 meeting

HOUSE JOINT RESOLUTION NO. 57

INTRODUCED BY M. JOPEK

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA PROVIDING FOR AN INTERIM STUDY OF CONSERVATION EASEMENTS ON STATE TRUST LANDS.

WHEREAS, citizens of the State of Montana value the preservation of traditional uses on school trust lands of grazing, farming, timber harvest, and general recreation; and

WHEREAS, if a conservation easement was purchased on school trust land, the public would get to examine and comment on that agreement to see how traditional uses are affected before the easement was finalized; and

WHEREAS, if valuable school trust lands are sold, the traditional uses on these lands could be lost; and

WHEREAS, the Department of Natural Resources and Conservation is charged with managing the state's school trust lands in a manner that derives revenue for the support of the common schools, the University System, and other state institutions; and

WHEREAS, the Department of Natural Resources and Conservation is currently working to increase the revenue earned from school trust lands by diversifying existing uses on school trust lands; and

WHEREAS, conservation easements are an effective tool available to protect these traditional uses while preserving the long-term value of trust lands and retaining the trust land base; and

WHEREAS, the money raised from the purchase of conservation easements on school trust lands is deposited in a nondistributable permanent trust, the interest of which can be used to benefit schools and other trust beneficiaries; and

WHEREAS, the money invested from the purchase of a conservation easement plus the money derived from annual leases or licenses for traditional uses can make traditional uses more financially lucrative for the schools and other trust beneficiaries.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee, pursuant to

1 section 5-5-217, MCA, or direct sufficient staff resources to:

2 (1) evaluate the benefits to the various trusts of granting easements in terms of years and in perpetuity;

3 (2) assess the alternatives with regard to appropriate entities to hold conservation easements on state

4 trust land;

5 (3) analyze how or if conservation easements can ensure that multiple use management occurs;

6 (4) evaluate the effectiveness and cost or benefit to the various trusts of continuing traditional classified

7 uses as part of the terms of a conservation easement; ~~and~~

8 (5) determine options and alternatives for providing the continuance of recreational uses that were in

9 place prior to an easement being granted; AND

10 (6) EVALUATE OPPORTUNITIES FOR THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO

11 PARTNER WITH OTHER ORGANIZATIONS TO ACQUIRE STATE TRUST LANDS THAT HAVE RESTRICTED DEVELOPMENT RIGHTS,

12 WHICH WOULD LOWER LAND ACQUISITION COSTS WHILE ALSO PERPETUATING TRADITIONAL USES OF THE LAND.

13 BE IT FURTHER RESOLVED, that if the study is assigned to staff, any findings or conclusions be

14 presented to and reviewed by an appropriate committee designated by the Legislative Council.

15 BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review

16 requirements, be concluded prior to September 15, 2008.

17 BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions,

18 comments, or recommendations of the appropriate committee, be reported to the 61st Legislature.

19 - END -

# Enabling Act

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

(Approved February 22, 1889.) [25 U.S. Statutes at Large, c 180 p 676.]

[President's proclamation declaring Washington a state: 26 St. at Large, Proclamations, p 10, Nov. 11, 1889.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under

the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

SEC. 5. That the convention which shall assemble at Bismarck shall form a constitution and State government for a State to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and State government for a State to be known as South Dakota: *Provided,* That at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "for the Sioux Falls constitution" it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at the election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed State, to the re-apportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the State of South Dakota shall be admitted as a State in the Union under said constitution as hereinafter provided; but the archives, records, and books of the Territory of Dakota shall remain at Bismarck, the capital of North Dakota, until an agreement in reference thereto is reached by said States. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "against the Sioux Falls constitution", then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and State government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

SEC. 6. It shall be the duty of the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said Territory, and agree upon an equitable division of all property belonging to the Territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the Territory, which shall be assumed and paid by each of the proposed States of North Dakota and South Dakota; and the agreement reached respecting the Territorial debts and liabilities shall be incorporated in the respective constitutions, and each of said States shall obligate itself to pay its proportion of such debts and liabilities the same as if they had been created by such States respectively.

SEC. 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions as provided for in this act, the Territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the Territory so rejecting its proposed constitution shall continue under the Territorial government of the present Territory of Dakota, but shall, after the State adopting its constitution is admitted into the Union, be called by the name of the Territory of North Dakota or South Dakota, as the case may be: *Provided,* That if either of the proposed States provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the Territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution or to amend the rejected constitution, and shall submit such new constitution or amended constitution to the people of the proposed State for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed State.

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for

resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

SEC. 9. That until the next general census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided,* That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

**Reviser's note:** Section 11 has at various times been amended by Congress as follows:

**(1) August 11, 1921:**

AN ACT To amend an Act approved February 22, 1889, entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889, be, and the same hereby is, amended by adding the following: *Provided, however,* That the State may, upon such terms as it may prescribe, grant such easements or rights in such lands as may be acquired in, to, or over the lands of private properties through proceedings in eminent domain: *And provided further,* That any of such granted lands found, after title thereto has vested in the State, to be mineral in character, may be leased for a period not longer than twenty years upon such terms and conditions as the legislature may prescribe. [42 U.S. Statutes at Large, c 61 p 158. Approved, August 11, 1921.]

## (2) May 7, 1932:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 11 of the Act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this Act shall be disposed of only at public sale after advertising - tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.

"The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor 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.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

SEC. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed. [47 U.S. Statutes at Large c 172 p 150. Approved, May 7, 1932.]

## (3) June 25, 1938:

AN ACT To increase the period for which leases may be made for grazing and agricultural purposes of public lands donated to the States of North Dakota, South Dakota, Montana, and Washington by the Act of February 22, 1889, as amended.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the second paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, as reads "but leases for grazing and agricultural purposes shall not be for a term longer than five years", is amended to read as follows: "but leases for grazing and agricultural purposes shall not be for a term longer than ten years". [52 U.S. Statutes at Large c 700 p 1198. Approved, June 25, 1938.]

## (4) April 13, 1948:

AN ACT To authorize the States of Montana, North Dakota, South Dakota, and Washington to lease their State lands for production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, for such terms of years and on such conditions as may be from time to time provided by the legislatures of the respective States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That the second paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, is amended to read as follows: "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective States; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years." [62 U.S. Statutes at Large c 183 p 170. Approved April 13, 1948.]

## (5) June 28, 1952:

AN ACT To authorize each of the States of North Dakota, South Dakota, and Washington to pool moneys derived from lands granted to it for public schools and various State institutions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the fourth paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended (47 Stat. 151), is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this section, each of the States of North Dakota, South Dakota, and Washington may pool the moneys received by it from oil and gas and other mineral leasing of said lands. The moneys so pooled shall be apportioned among the public schools and the various State institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted by this Act. Not less than 50 per centum of each such amount shall be covered into the appropriate permanent fund." [66 U.S. Statutes at Large c 480 p 283. Approved June 28, 1952.]

## (6) May 31, 1962:

AN ACT To amend the Act admitting the State of Washington into the Union in order to authorize the use of funds from the disposition of certain lands for the construction of State charitable, educational, penal, or reformatory institutions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676, as amended), is amended by inserting before the period at the end of the first sentence in the fourth paragraph of section 11 a comma and the following: "except that proceeds from the sale and other permanent disposition of the two hundred thousand acres granted to the State of Washington for State charitable, educational, penal, and reformatory institutions may be used by such State for the construction of any such institution". [Public Law 87-473. 76 U.S. Statutes at Large p 91. Approved May 31, 1962.]

## (7) June 30, 1967:

AN ACT To authorize the States of North Dakota, South Dakota, Montana, and Washington to use the income from certain lands for the construction of facilities for State charitable, educational, penal, and reformatory institutions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the second sentence of the fourth paragraph of section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676), as amended, is amended to read as follows: "Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions." [Public Law 90-41. 81 U.S. Statutes at Large p 106. Approved June 30, 1967.]

## (8) October 16, 1970:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676) as amended by the Act of May 7, 1932 (47 Stat. 150), and as amended by the Act of April 13, 1948 (62 Stat. 170) relating to the admission to the Union of the States of North Dakota, South Dakota, Montana, and Washington, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the second sentence of the first paragraph of section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act of May 7, 1932 (47 Stat. 150), is hereby amended to read as follows:

"Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to Federal lands that are surveyed, nonmineral, unreserved public lands within the State, or are reserved public lands within the State that are subject to exchange under the laws governing the administration of such Federal reserved public lands."

and that a new paragraph be added immediately following the above, as follows:

"All exchanges heretofore made under section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act approved May 7, 1932 (47 Stat. 150), for reserved public lands of the United States that were subject to exchange under law pursuant to which they were being administered and the requirements thereof have been met, are hereby approved to the same extent as though the lands exchanged were unreserved public lands."

and that the present paragraph 2 of section 11 be amended to read as follows:

"The said lands may be leased under such regulations as the legislature may prescribe." [Public Law 91-463. 84 U.S. Statutes at Large p 987. Approved October 16, 1970.]

SEC. 12. That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said States, to be selected and located in legal subdivisions as provided in section ten of this act, shall be, and are hereby, granted to said States for the purpose of erecting public buildings at the capital of said States for legislative, executive, and judicial purposes.

**Reviser's note:** Section 12 has been amended by Congress as follows:

AN ACT To amend section 12 of the Act approved February 22, 1889 (25 Stat. 676) relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, by providing for the use of public lands granted to the States therein for the purpose of construction, reconstruction, repair, renovation, furnishings, equipment, or other permanent improvement of public buildings at the capital of said States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 12 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, is amended to read as follows:

"That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of unappropriated public lands within such States, to be selected and located in legal subdivisions as provided in section 10 of this Act, shall be, and are hereby, granted to said States for public buildings at the capital of said States for legislative, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes."

SEC. 2. This Act shall take effect as of February 22, 1889. [Public Law 85-6. 71 U.S. Statutes at large p 5. Approved February 26, 1957.]

SEC. 13. That five per centum of the proceeds of the sales of public lands lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

SEC. 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and any portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the Territory of Dakota, for an asylum for the insane shall, upon the admission of said State of South Dakota into the Union, become the property of said State.

SEC. 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby, granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota, for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the State of Montana.

SEC. 16. That ninety thousand acres of land, to be selected and located as provided in section 10 of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

SEC. 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to wit:

To the State of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.

To the State of North Dakota a like quantity of land as in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.

To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a State reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

SEC. 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said States, in lieu thereof, for the use and the benefit of the common schools of said States.

SEC. 19. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.

SEC. 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to each of said Territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial legislatures. Any money hereby appropriated not necessary for such purpose shall be covered into the Treasury of the United States.

SEC. 21. That each of said States, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the States, respectively; and the circuit and district courts therefor shall be held at the capital of such State for the time being, and each of said districts shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who shall keep their offices at the capital of said State. The regular terms of said courts shall be held in each district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in

both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The Marshal, district attorney, and clerks of the circuit and district courts of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the State of Nebraska.

SEC. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: *Provided,* That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

SEC. 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be: *Provided, however,* That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives in the fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889. [25 U.S. Statutes at Large, c 180 p 676.]

SENATE BILL NO. 159

INTRODUCED BY L. GROSFIELD

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE BOARD OF LAND COMMISSIONERS TO GRANT EASEMENTS FOR SPECIFIC USES IN STATE LANDS; AMENDING SECTION 77-2-101, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 77-2-101, MCA, is amended to read:

**"77-2-101. Easements for ~~public~~ specific uses.** ~~(1) The board may grant easements in state lands for schoolhouse sites and grounds, public parks, community buildings, cemeteries, conservation purposes TO THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS ON PARCELS THAT ARE SURROUNDED BY OR ADJACENT TO LAND OWNED BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS AS OF JANUARY 1, 2001, environmental control purposes, and other public uses upon proper applications accompanied by accurate and duly verified plats from the lawfully constituted authorities having charge of those properties application, as provided in 77-2-102.~~ (1) UPON PROPER APPLICATION AS PROVIDED IN 77-2-102, THE BOARD MAY GRANT EASEMENTS ON STATE LANDS FOR THE FOLLOWING PURPOSES:

(A) SCHOOLHOUSE SITES AND GROUNDS;

(B) PUBLIC PARKS;

(C) COMMUNITY BUILDINGS;

(D) CEMETERIES;

(E) CONSERVATION PURPOSES:

(I) TO THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS FOR PARCELS THAT ARE SURROUNDED BY OR ADJACENT TO LAND OWNED BY THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS AS OF JANUARY 1, 2001;

(II) TO A NONPROFIT CORPORATION FOR PARCELS THAT ARE SURROUNDED BY OR ADJACENT TO LAND OWNED BY THAT SAME NONPROFIT CORPORATION AS OF JANUARY 1, 2001; AND

(III) TO A NONPROFIT CORPORATION FOR THE OWEN SOWERWINE NATURAL AREA LOCATED WITHIN SECTION 16, TOWNSHIP 28 NORTH, RANGE 21 WEST, IN FLATHEAD COUNTY; AND

(F) FOR OTHER PUBLIC USES.

(2) The board may grant ~~an easement~~ easements ~~in~~ ON state lands for the following purposes:

(a) right-of-way across or upon any portion of state lands for any public highway or street, any ditch, reservoir, railroad, private road, or telegraph or telephone line, or any other public use as defined in 70-30-102~~. This subsection shall not be construed to grant authority to convey any such land, except for the purposes above set forth~~; or

(b) any private building or private sewage system that encroaches on state lands."

NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval.

- END -

**Opponents' Testimony**: None.

**Questions from Committee Members and Responses**:

**SEN. MIKE TAYLOR** asked if there would be a cost associated with these unincorporated associations.

**Jan Sensibaugh, DEQ**, advised she does not believe there would be additional costs but would like to direct this question to **Jon Dilliard**, also of **DEQ**, with permission of the chair.

**Jon Dilliard, DEQ**, advised there would be a $20 filing fee with the Secretary of State just for the association and not each individual homeowner.

**Closing by Sponsor**:

**SEN. KEENAN** closed on **SB 147** without remarks.

## HEARING ON SB 159

**Sponsor**: **SEN. LORENTS GROSFIELD, SD 13, Big Timber**

**Proponents**: **Bud Clinch, Department of Natural Resources and Conservation**
**Clive Rooney, Department of Natural Resources and Conservation**
**Paul Sihler, Department of Fish, Wildlife and Parks**
**Janet Ellis, Montana Audubon Society**

**Opponents**: **None.**

**Opening Statement by Sponsor**:

**SEN. LORENTS GROSFIELD, SD 13, Big Timber**, spoke in support of **SB 159** and advised this bill comes at the request of the **Department of Natural Resources and Conservation (DNRC)**.

**SEN. GROSFIELD** opened by saying this bill addresses state trust lands within Wildlife Management Areas (WMA) purchased by the Department of Fish, Wildlife and Parks (DFWP). State lands are required by the Constitution to provide income for the state school trust fund, and this is done by charging grazing fees, for example, stumpage for timber, oil and gas leases, and even charging for recreational use. A problem arises when the state

lands lie within WMA, and an income-providing activity might not be compatible with the land being used as an elk habitat. With this bill, the DFWP would actually buy something akin to a conservation easement to use for their purposes and thus reimburse the school trust fund. He stated that he talked with both the DNRC and the DFWP about adding amendments in order to protect the integrity of the WMA and offered **EXHIBIT(nas07a04)**, the amendments plan, adding this was not exactly what they had talked about then, and that it was offered mainly for illustration purposes. He allowed as to how more work needed to be done with the language of the amendment.

**Proponents' Testimony**:

**Bud Clinch, Director, Department of Natural Resources and Conservation**, spoke in support of **SB 159** and pointed to a map of Montana showing the checkerboard ownership of these lands to make it easier to understand the problem.
***{Tape : 1; Side : A; Approx. Time Counter : 0 - 30}***
**Mr. Clinch** talked about the long-standing practice of the DFWP putting together WMA by purchasing the fee title to existing private lands. Due to the scattered nature of the school trust lands, some of these private lands purchased included school trust land. He said there had seldom been a problem with this until more recently; most notably with two specific areas, the Sun River Game Range near Augusta, and the Blackfoot-Clearwater Game Range near Seeley Lake, for which there was a proposal to sell recreational cabin sites. Because of the conflict between the department's mandate to maximize revenue on these state lands, and the DFWP's mission to manage wildlife habitat, his department came up with this idea of selling easement rights to the DFWP on tracts with game ranges. He repeated **SEN. GROSFIELD'S** concern over the language in the amendment and said this would be worked out so both agencies could work side by side, each fulfilling their mission. He admitted that the issue of a conservation easement sparked controversy among some Montanans. With regards to the Blackfoot-Clearwater Game Range, he stated they would have to sit down and negotiate with the DFWP about the potential of recreational and commercial development, ascertain how much money the school trust fund would lose if this easement were sold to the DFWP and the land not developed for revenue. With regards to the Sun River Game Range, however, the threat would not be recreational development but rather a potential gas and oil lease. He said this would not necessarily apply to every tract, and that they would have to take a close look in specifying the exact locations, and determine what the offset would be in terms of revenue, but he felt that this bill would enable both departments to do their job. He then referred to the stricken section about "environmental control purposes",

saying there was a statute on the books to that effect and it was unnecessary to have it in the amendment. He then referred to a section in the bill which deals with the sometime inadvertent encroachment of a private landowner onto state lands, as was the case in the Seeley Lake area where the corner of a house protruded onto state land. A sliver of the land then had to be sold to the adjacent landowner. He felt this bill would enable the department to deal with this kind of situation in a better way.

**Paul Sihler, Administrator of the Field Services Division, Department of Fish, Wildlife and Parks** rose in support of **SB 159** and offered written testimony, **EXHIBIT(nas07a05)**.

**Janet Ellis, Montana Audubon**, thought the bill clarified the authority the DNRC already has. She referred to a 442 acre area of school trust land near Kalispell, the Owen-Sowerwine Natural Area, saying this was one example where a long-term easement could be obtained in the future.

**Opponents' Testimony: None.**

**Questions from Committee Members and Responses: None.**

**Closing by Sponsor:**

**SEN. GROSFIELD** stated that he felt this was a good concept, enabling both agencies to work together and promised to work on the wording for the amendment before executive action was taken on **SB 159**.

**EXHIBIT(nas07a06), (SB015902.amv) Amendments to SB 159** received January 12, 2001.

**OTHER BUSINESS:**

**CHAIRMAN CRISMORE** advised executive action will be taken this Friday on a couple of bills we have already heard.

**ADJOURNMENT**

**Adjournment: 3:48 P.M.**

*{Tape : 1; Side : B; Approx. Time Counter : 30.1 - 48}*

**SEN. WILLIAM CRISMORE, Chairman**

**NANCY BLECK, Secretary**

**WC/NB**

**EXHIBIT(nas07aad)**

## HEARING ON SB 159

**Sponsor**: **SEN. LORENTS GROSFIELD, SD 13, Big Timber**

**Proponents**: **Bud Clinch, DNRC**
**Paul Sihler, Montana Fish, Wildlife & Parks**
**Janet Ellis, Montana Audubon**

**Opponents**: None.

**Opening Statement by Sponsor**:

***{Tape : 1; Side : A; Approx. Time Counter : 0.7}***

**SEN. LORENTS GROSFIELD, SD 13, Big Timber**, stated this is a small bill that adds a tool that can be used regarding state lands. It allows the Board of Land Commissioners to grant easements for certain purposes in certain cases. He gave an example of when the department may use this. Another purpose of the bill has to do with some ranches the Department of Fish, Wildlife and Parks owns. In some cases those ranches have state lands in the middle of them. How can the DFWP insure that the use of that land remains compatible with the wildlife management area purpose of the surrounding land? Especially, how does that remain compatible in the face of something like oil and gas leasing or other kinds of development? DNRC is required to get profit off that land for purpose of funding the schools. SB 159 gives DFWP a way to acquire an easement for conservation purposes. They would not be buying the land, just the easement. There are only a few cases where this will be useful but it is a needed tool.

**Proponents' Testimony**:

***{Tape : 1; Side : A; Approx. Time Counter : 5.4}***

**Bud Clinch, DNRC**, stated, this bill does two things. It gives the department the ability to issue easements in response to situations where there is an encroachment onto state land. He gave an example. Also, an easement can be sold to DFWP at full market value. The bill furthers the conservation purposes of DFWP. This is the best way to solve any current problems regarding these properties owned by DFWP. This fulfills the trust land mandate as well as provides the opportunity for DFWP to be assured that their mission can be met. In developing, selling and purchasing conservation easements each one is quite different. Each particular situation will bring with it a certain set of circumstances. Through negotiations a price will be determined for full market value.

**Paul Sihler, Montana Fish, Wildlife & Parks,** submitted written testimony **EXHIBIT(nah50a01).**

**Janet Ellis, Montana Audubon,** asked the committee to hold off on executive action of SB 159 as she is working on an amendment. Montana Audubon does support the bill in it's current form but had some concerns they will put in amendment form. **Ms. Ellis** spoke briefly about those concerns.

**Opponents' Testimony**: None.

**Questions from Committee Members and Responses**:

***{Tape : 1; Side : A; Approx. Time Counter : 15.7}***

**REP. BROWN** asked **SEN. GROSFIELD,** regarding line 21, is telegraph outdated language? **SEN. GROSFIELD** stated, the railroads have telegraph lines but he doesn't know if they are used. **REP. BROWN** asked **SEN. GROSFIELD** if he would have a problem with the committee eliminating that language. **SEN. GROSFIELD** stated no. **REP. BROWN** asked, since this involves the selling of property, is there any language about money in the bill. **SEN. GROSFIELD** stated it's not in 77-2-101 but it is in title 77 that the board cannot give up an interest in state lands without full market value. **REP. BROWN** asked if there is a fine involved in someone building a septic system or their home on state land besides the state's willingness to give up that property. Is a fine included in that section? **SEN. GROSFIELD** stated he does not know. **REP. BROWN** redirected the question to **Mr. Clinch** who stated that there is a policy within the Board of Land Commissioners to assess a penalty up to three times the appraised value.

**REP. HURDLE** asked **Mr. Clinch** if state agencies can own land is that not state land? **Mr. Clinch** stated that is correct. **REP. HURDLE** asked **Mr. Clinch** what does the deed say, does it say that it is owned by the department or the state? **Mr. Clinch** stated that varies from land to land. This bill specifically talks about school trust lands. Those deeds reference the State of Montana and say that the lands shall be managed for the generation of revenue. **REP. HURDLE** asked if FWP owns lands which are not considered to be state lands. **Mr. Clinch** stated FWP owns lands in their own right and they are considered state lands. This bill is specifically talking about school trust lands. **REP. HURDLE** asked what the deed says on the FWP lands, are they state lands or do they belong to the agency? **Mr. Clinch** stated the deed probably says the State of Montana and further references FWP. **REP. HURDLE** asked where the money came from when FWP purchased those lands. **Mr. Clinch** stated the revenue probably

came from a variety of sources. **REP. HURDLE** asked, if a state agency can own land and sell it to another state agency who pays for it? **Mr. Clinch** stated the money comes from various revenue sources.

**REP. HARRIS** asked **Mr. Clinch** if there is a constitutional issue here in trading these lands. **Mr. Clinch** stated that has been reviewed. DNRC already has the authority to grant easements for a wide variety of things. He gave an example. **REP. HARRIS** stated, the constitution says that you must get the full market value when you sell school trust. When the money you are getting is from the government are you really getting full market value? **Mr. Clinch** stated, the concept of full market value has nothing to do with who's pocket you are taking it out of. It has to do with what rights you are transferring and what is the current value of those in the market place. There has never been a constitutional issue regarding this practice.

**REP. STORY** asked **Mr. Clinch**, regarding lines 15 and 16, why did they take out environmental control purposes? **Mr. Clinch** stated that language was proposed language. There is another provision in existing statute that allows DNRC to do what that language would have done. It would be unnecessary to include that language in this bill.

**REP. LAIBLE** asked **Mr. Clinch** if we are actually selling school trust land at full market value or are we granting an easement for that land. **Mr. Clinch** stated that we are granting an easement or lease. The board doesn't usually allow selling of state land. He gave some examples. This bill would allow DNRC to sell FWP a restriction on DNRC's development rights.

**Closing by Sponsor**:

***{Tape : 1; Side : A; Approx. Time Counter : 33.9}***

**SEN. GROSFIELD** stated these lands are purchased with federal excise tax money. This bill is a small tool to be used. He asked the committee to hold off on executive action to work on the amendment. He asked for a do concur.

## HEARING ON SB 31

**Sponsor: SEN. DALE BERRY, SD 30, Hamilton**

**Proponents: Bud Clinch, DNRC**
**Scott Odegard, Montana Electric Co-ops**
**Bob Fouhy, Northern Electric Co-op**

RETURN ORIGINAL AFTER
RECORDING TO: DILS
MT FISH, WILDLIFE & PARKS
P O BOX 200701
HELENA MT 59620-0701

# BLACKFOOT CLEARWATER
# DEED OF
# CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is made this 15th day of March, 2004, by the State of Montana, Department of Natural Resources and Conservation whose address is 1625 11th Avenue, Helena, Montana 59620-1601 ("Landowner"), to the State of Montana, Department of Fish, Wildlife & Parks whose address is 1420 East 6th Avenue, Helena, Montana 59620-0701 ("Department").

## I. RECITALS

A. The people of the State of Montana recognize that certain native plant communities providing important fish and wildlife habitat are worthy of perpetual conservation and have directed the Department of Fish, Wildlife, and Parks to acquire conservation easements by voluntary, cooperative means to conserve wildlife habitat.

B. The people of the State of Montana recognize that trust lands are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of the State of Montana, as provided in The Enabling Act. In its capacity as Landowner, the State is the owner of certain real property consisting of state trust lands in Powell and Missoula Counties, Montana, the surface estate of which ("the Land") is described in Exhibit A attached hereto and incorporated herein by this reference, and is subject to the terms of this Conservation Easement.

C. The Land possesses significant communities of native plants, fish and wildlife habitat, natural and scenic open space, and recreation values, collectively conservation values, worthy of perpetual conservation and valuable to the people of Montana. In particular, the Land possesses montane forest and riparian vegetation communities, important in Montana as fish and wildlife habitat for numerous species. The Land has a long history of forest management compatible with its fish and wildlife values. The maintenance of a productive forest-management program consistent with the Landowner's trust fiduciary responsibilities on behalf of the State, is of statewide and local importance.

D. The conservation values of the Land can be protected by granting a conservation easement to the Department with the Landowner retaining fee title to the Land.

E. Landowner and Department intend that the conservation values of the Land be preserved and maintained by the continuation of land use patterns existing at the time of this grant that do not significantly impair or interfere with these conservation values.

F. The Land provides important opportunities for public hunting and wildlife viewing. Public hunting is an effective tool of wildlife management and public hunting and wildlife viewing secured by this Conservation Easement are desirable uses of the Land. The Landowner historically has managed public recreational access on the Land in concurrence with all opportunities and restrictions set forth by the Department for the Blackfoot-Clearwater Wildlife Management Area. The perpetuation of this arrangement best serves the public's interest in wildlife and wildlife-based recreation on the Land.

## II. AGREEMENTS

In consideration of the sums paid by the Department, and in further consideration of the recitals, mutual covenants, and terms contained in this Conservation Easement and pursuant to the laws of the State of Montana and in particular to the Open-Space and Voluntary Conservation Easement Act, §§76-6-101 through 76-6-211, MCA; the Department of Fish, Wildlife & Parks' wildlife habitat acquisition authority, §§87-1-209 through 87-1-241, MCA; and Title 70, chapter 17, MCA, Landowner voluntarily grants and conveys to the Department and the Department accepts a Conservation Easement in perpetuity consisting of the following rights and restrictions over and across the Land.

### A. PURPOSES OF THE CONSERVATION EASEMENT

1. The purpose of this Conservation Easement is to preserve, protect, and enhance in perpetuity the conservation values of the Land, particularly the winter-spring habitat for populations of elk, mule deer, and white-tailed deer. The Department recognizes the current Landowner holds the Land in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of the state of Montana and as such administers the Land to secure the largest measure of legitimate and reasonable advantage to the State. The Department and Landowner agree that the traditional uses that occur at the time this Conservation Easement is executed, including among others, forestry and public recreation, and any future uses that are consistent with the condition of the Land at the time this Conservation Easement is executed, further the purpose of this Conservation Easement and meet the Landowner's trust responsibilities to the State.

2. Pursuant to the terms of §76-6-107, MCA, the conservation values of the Land are preserved by the terms of this Conservation Easement and are further described herein.

### B. LANDOWNER'S RIGHTS

Landowner reserves to itself, successors, and assigns, all rights accruing from ownership of the Land, including the right to enter and manage the Land and engage in or permit others to engage in all uses of the Land that 1) are not expressly prohibited or restricted by this Conservation Easement, 2) are not inconsistent with the purposes of the Conservation Easement, and 3) will not significantly impact the conservation values of the Land. The significance of an impact will be evaluated by the severity, duration, geographic extent, or frequency of the occurrence of the potential impact. Without limiting the generality of the previous statement and subject to the restrictions on Landowner's activities in this Conservation Easement, the following rights are expressly reserved:

1. The right to manage forested lands and to harvest timber and timber products from the Land pursuant to Administrative Rules of Montana §36.11.401 through 36.11.450 as amended from time to time in a manner that protects the conservation values of the Land and complies with the Management Plan, the first three pages of which are attached to this Conservation Easement as Exhibit B1 and incorporated herein as an abstract. If the Management Plan is revised from time to time with the mutual consent of the Department and Landowner, then the forest management terms established by the Management Plan will be the terms under which forest management may continue on the Land, but in no event may the forest management terms be less restrictive than the terms in the March 2004 Management Plan referred to in this paragraph.

2. The right to maintain, enhance, and develop water resources on the Land in accordance with applicable state and federal regulations for those rights enumerated under Section II.B., Landowner's Rights. These rights include, but are not limited to the following: The right to restore, enhance, and develop water resources, including ponds; to locate and construct stockwater facilities; and to dedicate water rights to in-stream flow for the benefit of fish and wildlife.

3. The right to repair, renovate, or replace existing nonresidential improvements, including but not limited to culverts, bridges, cattleguards, gates, canals, ditches, and irrigation structures.

4. The right to construct, remove, maintain, repair, or replace fences, provided that any new fences do not significantly impact wildlife habitat or impede wildlife migration on and through the Land.

5. The right to use, construct, remove, maintain, repair, or replace roads for Landowner's purposes, including timber and mineral management purposes allowed by this Conservation Easement. New roads may not be paved, and any new road at a minimum must comply with Best Management Practices (BMPs), as defined and described in a publication adopted by the State of Montana called Best Management Practices for Forestry in Montana (July 2002). The BMPs are incorporated in this Conservation Easement by this reference, the first three pages of which are attached to this Conservation Easement as Exhibit B2 and incorporated herein as an abstract. If the BMPs are revised and improved from time to time then with the mutual consent of the Department and Landowner, the road standards established by the BMPs will be the standard under which new roads may be constructed on the Land, but in no event may the road standards fall below the standards established in the July 2002 BMP publication referred to in this paragraph.

6. The right to use agrichemicals for control of noxious weeds and for selective control of vegetation for reforestation purposes, as defined by the State of Montana or other lawful authority with jurisdiction and as addressed in the Management Plan. Such use must be in a manner that will minimize damage to native plants.

7. The right to use motor vehicles and timber harvesting equipment in the ordinary course of the Landowner exercising its rights under this Conservation Easement.

8. The right to grant new utility easements or oil or natural gas pipeline easements provided that any new pipelines or utility lines are underground. The installation of utility or pipeline structures on the Land requires prior notice to the Department.

9. The right reserved for itself and its lessees or agents the right to enter upon the Land to prospect for, develop, mine, and remove coal, oil, oil shale, gas, phosphate, sodium, and other mineral deposits, and to occupy and use so much of the surface as may be required for all purposes reasonably extending to the exploring for, mining, and removal of the mineral deposits from the Land. For any of Landowner's mineral estate located within the current boundary of the Blackfoot-Clearwater Wildlife Management Area, as depicted on Exhibit D, the Landowner will include on any mineral lease, a stipulation requiring the mineral lessee to submit to the Landowner for review and approval an operating plan for any proposed surface activity on the leased mineral estate. Further, the Landowner will expressly reserve the right, based on Landowner's review, to approve, modify, or deny any proposed surface activity on the leased mineral estate. The Department reserves the right to comment on any future mining activity.

10. Upon mutual consent by the Landowner and the Department, the right for either party to manipulate native vegetation and waters for the sole purpose of enhancing fish and wildlife habitat on the Land and engage in habitat enhancement or restoration activities that further the goals of maintaining or improving habitat characteristics. Such activities are not required by this Conservation Easement, but this Conservation Easement is also not intended to preclude opportunities for habitat enhancement.

## C. DEPARTMENT'S RIGHTS

The rights conveyed to the Department by this Conservation Easement are:

1. The right to identify, preserve, and protect in perpetuity the fish and wildlife habitat, particularly the montane forest and riparian vegetation communities on the Land, the Land's ecological features and its natural flora, fauna, water resources, and other conservation values.

2. The right to enter the Land at the Department's expense to monitor Landowner's compliance and to enforce the restrictions on the Landowner's activities and rights granted to the Department by this Conservation Easement, to observe, study, and make scientific observations of the Land's fish and wildlife habitat and ecosystems, and to establish and maintain vegetation

monitoring transects and enclosures, all upon prior notice to Landowner, and in a manner that will not unreasonably interfere with the use of the Land by the Landowner.

3. The right to prevent any activity on, or use of the Land that is inconsistent with this Conservation Easement and to require the restoration of any areas or features of the Land that may be damaged by inconsistent activity or use by the Landowner, as specified in this Conservation Easement.

4. The right, on behalf of the general public, of access for the purpose of general and special recreational use on the Land in accordance with §§ 77-1-801 through 815, MCA, §§ 36.25.143 through 36.25.162, ARM, or Department regulation. The Department may institute seasonal closures or restrictions of public access on the Land as necessary to protect wildlife habitat. Seasonal closures of Landowner's activities only apply to the Landowner's recreational use of the land. It is the intent of the Landowner and the Department that public access to the Land be managed in accordance with regulations for the Blackfoot-Clearwater Wildlife Management Area.

5. Upon prior notice to Landowner, the right to allow livestock grazing consistent with the Management Plan to enhance wildlife and fish habitat.

## D. RESTRICTIONS ON LANDOWNER'S ACTIVITIES

Any activity or use of the Land by the Landowner, its lessees or agents, not enumerated in Section II.B., Landowner's Rights, that is not consistent with the purposes of this Conservation Easement is prohibited. Without limiting this general prohibition, the following activities and uses are expressly prohibited or restricted.

1. Except as provided for in this Conservation Easement, the removal, control, or manipulation of native vegetation by any means is prohibited, including but not limited to the plowing, chemical treatment, or removal of native vegetation.

2. No cultivation or farming may occur on the Land.

3. The partition, division, subdivision, or de facto subdivision of the Land, including but not limited to the timber estate is prohibited, except for the following:

a. The Landowner may sell, gift, devise, lease, or exchange the Landowner's timber stumpage rights as long as these timber rights are not permanently severed from the Land.

b. The sale, gift, devise, lease, exchange, or other conveyance ("Transfer") of a portion of land for boundary adjustment, agricultural, or timber management purposes is allowed, provided that no more than five parcels may be created from four divisions of the Land covered by this Conservation Easement, and further provided that any such Transfer(s) must be effected with an express provision reflecting that the Land is subject to the terms and conditions of this Conservation Easement, without modification or expansion of such terms.

The Landowner shall furnish the Department with a copy of the pertinent portion of any document or conveyance used to affect such a transfer at least thirty (30) days prior to its execution. Further, at the time of any conveyance, the Landowner shall notify the Department and a successor in interest of how many divisions of the four total allowed divisions have occurred and how many of the four total allowed divisions the Landowner retains and conveys, if any, to the successor in interest.

Prior to transfer of title, the Department shall provide a copy of this Conservation Easement to Purchasers or other successors in interest to the Landowner.

For purposes of this Conservation Easement, a subdivision means a division of land or land so divided that creates more than five distinct parcels, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed in any manner; and includes any resubdivision and a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes. Further, the sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is considered a subdivision under this Conservation Easement. The prohibitions against subdivision contained in this paragraph also apply to the residential or commercial sale, rental, lease, or other conveyance of the Land or any portion of the Land subdivided prior to the grant of this Conservation Easement to the Department. A right of way easement issued by the Landowner does not constitute a subdivision under this Conservation Easement.

The Land may not be used as open or natural space or parkland for any subdivision or development purposes or requirements on land not covered by this Conservation Easement, nor may Landowner transfer any development rights on or to the Land separate from the Land. For purposes of this Conservation Easement, development rights include, without limitation, those rights, however designated, now or hereafter associated with the Land that may be used to compute development density, lot yield, or any other development variable of or pertaining to the Land or any other property.

4. Any residential, commercial or industrial use, construction of related improvements, or activity on the Land, other than those commercial or industrial improvements relating to mineral rights reserved under Section II. B.9., Landowner's Rights, is prohibited.

5. Landowner shall retain any and all water rights appurtenant to the Land and may not transfer, encumber, sell, abandon, or otherwise separate such rights from the Land, except as provided in Section II. B.2., Landowner's Rights.

6. Except as provided in this Conservation Easement under Paragraphs II. B.2 and II.B.10, the drainage, filling, dredging, or diking of the wetland/riparian areas described in Exhibit C, attached hereto and incorporated herein by this reference, or disturbance of the soil within fifty feet of the thread of any perennial stream on the Land is prohibited, except for maintenance and/or use of existing roads.

7. The deliberate control, removal, or manipulation of any deciduous woody vegetation by any means is prohibited within 50 feet of any perennial stream and within wetlands greater than 0.1 acre on the Land, except as needed for the ordinary course of constructing or maintaining roads, fences, and ditches provided for and allowed under this Conservation Easement.

8. The renting or leasing of, or sale of access to the Land to others for hunting, fishing, trapping, or winter recreational purposes, whether or not as a part of a commercial outfitting or guiding business, is prohibited, except as allowed under the authority of a state lands recreation license or Montana wildlife conservation license. Operating a commercial hunting or fishing operation, or charging fees (sometimes known as trespass fees) for hunting, fishing, trapping, or winter recreational activities on the Land or for access to public land is prohibited. Neither the Department nor the Landowner may sell, assign, convey, or otherwise transfer any interest in the Land or in the Landowner, if the Landowner is a corporation, partnership, or other entity, for the purpose of providing access to the Land in contravention of this paragraph.

9. The use of the Land in connection with a game farm, game bird farm, shooting preserve, fur farm, zoo or menagerie, or the ownership, leasing, keeping, holding, capture, propagation, release, introduction, or trade in any animal that may pose a threat to any mammalian, avian, reptilian, aquatic, or amphibian wildlife species, whether or not indigenous to Montana, is prohibited. This prohibition does not apply to domestic livestock.

10. The processing, dumping, storage, or other disposal of wastes, refuse and debris on the Land is prohibited, except for nonhazardous and nontoxic materials generated by activities permitted on the Land. This prohibition does not apply to activities of the Landowner, its lessees, or agents that are conducted pursuant to Section II.B.9, Landowner's Rights.

## E. ESTOPPEL CERTIFICATES

For a potential transfer of an interest in the Land, upon receipt of a written request from the Landowner, the Department shall, within sixty (60) days execute and deliver to the Landowner, or to any party designated by the Landowner, a statement in writing, certifying: (i) that this Conservation Easement (including all recorded amendments, if any) remains in full force and effect, and (ii) that, to the best of the Department's knowledge, the Landowner is in compliance with the Landowner's duties and obligations under this Conservation Easement, or that, to the best of the Department's knowledge, the Landowner is not in full compliance with this Conservation Easement. Any statement of noncompliance must incorporate an explanation of the reasons for the Landowner's noncompliance. Any such certification will be limited to the condition of the Land as of the Department's most recent inspection. If the Landowner requests more current documentation, the Department shall conduct an inspection, at the Landowner's expense, within sixty (60) days of receipt of the Landowner's written request.

## F. MANAGEMENT PLAN

A Management Plan has been developed for forest management, grazing management, public access management, specific wildlife habitat and wildlife passage improvement measures, vegetation management, and other matters of mutual interest to the parties. The Management Plan is not recorded, but is incorporated into this Conservation Easement by reference. The parties agree to abide by the specific requirements of the Management Plan, which has been developed to provide detailed guidance in management of the Land. The parties shall meet annually to review the Management Plan and, if deemed necessary, to propose amendments. Any amendments to the Plan must have the consent of both parties and must be in writing and signed and acknowledged by the parties. If there is any inconsistency between the terms of the Management Plan and this Conservation Easement, the terms of this Conservation Easement control. The Department shall keep a current Management Plan in its files and will make the current Management Plan available to successors in interest to the Land.

## G. CONSERVATION EASEMENT BASELINE REPORT

The parties agree that a Conservation Easement Baseline Report (Report), will be completed by a Department biologist or natural resource professional familiar with the area, reviewed and mutually agreed to by the Department and Landowner, and acknowledged by them to be an accurate representation of the physical and biological condition of the Land and its nonresidential physical improvements as of the date of the conveyance of this Conservation Easement. In the event a controversy arises with respect to the nature of the biological and/or physical condition of the Land and its improvements, the parties may use the Report, as well as all other relevant or material documents, surveys, reports, or other information to assist in the resolution of the controversy. The failure of either party to execute the Report may not affect the enforceability or validity of any other provision of the Conservation Easement.

## H. NOTICE TO THE DEPARTMENT

The purpose of requiring the Landowner to notify the Department prior to undertaking certain permitted or proposed activities is to afford the Department an opportunity to ensure that activities are designed and carried out in a manner consistent with the purposes and other provisions of this Conservation Easement. Whenever prior notice is required under this Conservation Easement, Landowner must notify the Department, or the Department's designated contact, in writing not less than sixty (60) days prior to the date the Landowner intends to undertake the permitted activity. The notice must be sent by registered or certified mail, return receipt requested, or by courier, or personal delivery, and must describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit the Department to make an informed judgment as to its consistency with this Conservation Easement. The Department has sixty (60) days from receipt of the notice, as indicated by the registered or certified return receipt, or other proof of receipt, to review the proposed activity and to notify the Landowner of its objections to the proposed activity. Objections must be based upon the Department's opinion that the proposed activity is inconsistent with this Conservation Easement. If, in the opinion of the Department, it is possible that the proposed activity can be modified to be consistent with the Conservation Easement, the

Department shall inform the Landowner of the manner in which the proposed activity may thereafter be conducted in a manner that is mutually acceptable to the Landowner and the Department. The Department's response to Landowner's notice must be sent by registered or certified mail, return receipt requested, or delivered by courier, or personal delivery service.

If the Department fails to post its response to the Landowner's notice within sixty (60) days of receipt of the notice, the proposed activity must be deemed to be consistent with the terms of this Conservation Easement. The Department has no further right to object to the activity identified by such notice. The Landowner is under no liability or obligation for any failure to give prior notice for any activity undertaken by the Landowner necessitated by virtue of fire, flood, act of God, or other element, or any other emergency; however, after such an event, if there is damage to the conservation values protected by this Conservation Easement, the Landowner shall notify the Department of the damage as soon as practicable.

Any communication that is required must sent by registered or certified mail, return receipt requested, or delivered by courier, or personal delivery service and shall be addressed as follows:

To Landowner: Montana Department of Natural Resources and Conservation
Trust Land Management Division Administrator
P O Box 201601
Helena, Montana 59620-1601

And:

Montana Department of Natural Resources
Southwestern Land Office
1411 27th
Missoula, MT 59804-3199

To Department: Montana Department of Fish, Wildlife & Parks
Wildlife Division Administrator
P O Box 200701
Helena, Montana 59620-0701

or to such other address as either party from time to time shall designate by written notice to the other.

## I. DISCRETIONARY CONSENT

The Department's consent for activities otherwise prohibited or requiring notice to the Department in Section II.H., Notice to the Department, may be given under the following conditions and circumstances: If, owing to unforeseen or changed circumstances, any of the prohibited activities listed in Section II.D., Restrictions on Landowner's Activities, are deemed desirable by both the Landowner and the Department, the Department may, at its sole discretion, give permission for such activities, subject to the limitations herein. Such requests for permission, and requests for permission for

activities requiring the Department's consent, must be in writing and must describe the proposed activity and changed conditions in sufficient detail to allow the Department to judge the consistency of the proposed activity with the purpose of this Conservation Easement. The Department may give its permission only if it determines, in its sole discretion, that such activities (1) do not violate the terms of this Conservation Easement; and (2) enhance the conservation values of the Land. Notwithstanding the foregoing, the Department and the Landowner have no right or power to agree to any activities that would result in the termination of this Conservation Easement under state or federal law. Nothing in this section may require the Department to consent to any activity otherwise restricted in this Conservation Easement, or to consult, or negotiate regarding the withholding or provision of such consent. Further, this discretionary consent may not set a precedent for future actions.

## J. REMEDIES FOR UNAUTHORIZED USES AND PRACTICES

If the Department alleges that the Landowner has violated the terms of this Conservation Easement or that a violation is threatened, the Department shall give written notice to the Landowner of the alleged violation and request corrective action sufficient to cure the alleged violation.

If the Landowner fails to respond to the alleged violation to the satisfaction of the Department within thirty (30) days after receipt of notice from the Department, or under circumstances where the alleged violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing the alleged violation within the thirty (30) day period, or fails to continue diligently to cure such alleged violation until finally correct, if the Landowner is a Montana state agency, the Department may request a contested case hearing under the Montana Administrative Procedures Act. If the Landowner is not a Montana state agency, the Department may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, to enjoin the violation, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Conservation Easement or injury to any conservation values protected by the terms of this Conservation Easement or damage to any conservation values protected by this Conservation Easement, and to require the restoration of the Land to the condition that existed prior to the injury. Without limiting the Landowner's liability, the Department, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Land.

If, during the contested case process there is need for immediate injunctive relief, the Department shall have the right to file an action for injunction or specific performance, and the restoration of that portion of the Land affected by the activity to a condition consistent with the terms of this Conservation Easement.

The Department's rights under this provision apply equally in the event of either actual or threatened violation of the terms of this Conservation Easement, and the Landowner agrees that if Department's remedies at law for any violation of the terms of this Conservation Easement are inadequate, the Department is entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which the Department may be entitled,

including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. The Department's remedies described in this section are cumulative and are in addition to all remedies available at law or in equity.

Nothing contained in this Conservation Easement may be construed to entitle the Department to bring any action against the Landowner for any injury to or change in the Land resulting from causes beyond the Landowner's control, including, without limitation, fire, flood, storm, and natural earth movement, or from any prudent action taken to prevent, abate, or mitigate significant injury to the Land resulting from such causes.

Enforcement of the terms of this Conservation Easement is at the discretion of the Department or Landowner, and any forbearance by the Department or Landowner to exercise its rights under this Conservation Easement in the event of any breach of any term of this Conservation Easement by the Department or Landowner may not be deemed or construed to be a waiver by the Department or Landowner of that term or of any subsequent breach of the same or any other term of this Conservation Easement. No delay or omission by the Department or Landowner in the exercise of any right or remedy upon any breach by the Department or Landowner may impair the right or remedy or be construed as a waiver, nor may any forbearance or delay give rise to a claim of laches or prescription.

## K. HOLD HARMLESS AND INDEMNITY

This paragraph applies to those actions that fall outside of the scope of Title 2, chapter 9, parts 1-3, MCA. The Landowner shall hold harmless, indemnify, and defend the Department and its employees, agents, and contractors from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including without limitation, reasonable attorneys' fees, arising from or in any way connected with injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Land, regardless of cause, unless due to the negligence or willful misconduct of the Department or its agents, employees, or contractors.

The Department similarly agrees to hold harmless, indemnify, and defend the Landowner and its employees, agents and contractors from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including without limitation, reasonable attorneys' fees, arising from or in any way connected with injury to or the death of any person or physical damage to any property, resulting from any action, omission, condition, or other matter related to or occurring on or about the Land, as a result of the Department's exercise of its rights granted under this Conservation Easement, unless due to the negligence or willful misconduct of the Landowner or its agents, employees, or contractors.

## L. TERMINATION, EXTINGUISHMENT, CONDEMNATION

It is the unequivocal intention of the parties that the terms of this Conservation Easement are perpetual. If circumstances arise in the future that make impossible or impractical any continued use of the Land for the purposes or conservation values described herein, this Conservation Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the proceeds to which the Department or Landowner are entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Land subsequent to such termination or extinguishment, will be determined, unless otherwise provided by Montana law at the time, as herein provided. The parties agree that changed economic conditions may not be circumstances justifying the modification, termination, or extinguishment of this Conservation Easement. The Department shall use all such proceeds in a manner consistent with the conservation purposes of this Conservation Easement.

If the Land covered by this Conservation Easement is taken, in whole or in part, by exercise of the power of eminent domain so as to abrogate the restrictions imposed by this Conservation Easement, the Landowner and the Department may join in appropriate actions to recover full value of the Land (or portion thereof or interest therein) taken and all incidental or direct damages resulting from such taking. Any expense incurred by the Landowner or the Department in any such action must first be reimbursed out of the recovered proceeds; the remainder of such proceeds must be divided between the Landowner and the Department in proportion to their interest in the Land, or portion thereof. The Department is entitled to compensation at a rate of 21.65 percent of the appraised value at the time of the taking.

## M. SUBORDINATION

Upon request, the Department agrees to subordinate its rights under this Conservation Easement to the rights of any future mortgage holders or other holder of a security interest provided that Department's rights subject to subordination are limited to monetary aspects of enforcement and collection of a loan which under no circumstance may result in any modification, extinction, waiver, amendment, or alteration of any term or condition of this Conservation Easement or Department's right to enforce these terms and conditions. Any future subordination must be formalized in writing in a separate instrument between the Department and the lender.

## N. ASSIGNMENT

This Conservation Easement is transferable with the approval of the Landowner. As a condition of such transfer, the Department shall require that the conservation purposes intended by this grant be carried out.

## O. AMENDMENT

If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate, the Landowner and the Department are free to jointly amend this Conservation Easement; provided that no amendment may be allowed that will affect the qualifications of this Conservation Easement as a conservation easement under any applicable laws, including §76-6-101, et seq., MCA, or Section 170(h) of the Internal Revenue Code, as amended, and any amendment must be consistent with the purposes of this Conservation Easement, and may not affect its perpetual duration.

## P. RECORDATION

The Department shall record this instrument in a timely fashion in the official records of Missoula and Powell Counties, Montana, and may re-record it at any time as may be required to preserve its rights in this Conservation Easement.

## Q. GENERAL PROVISIONS

1. Controlling Law. The interpretation and performance of this Conservation Easement will be governed by the laws of the State of Montana.

2. Construction. Any general rule of construction to the contrary notwithstanding, this Conservation Easement must be liberally construed in favor of the grant to effect the purpose of this Conservation Easement and the policy and purpose of §76-6-101, et seq., MCA. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Conservation Easement that would render the provision valid must be favored over any interpretation that would render it invalid.

2. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement as it relates to the Land described in Exhibit A, and supersedes all prior discussions, negotiations, understandings, or agreements relating to such Conservation Easement.

3. No Forfeiture. Nothing contained in this Conservation Easement will result in a forfeiture or reversion of Landowner's title in any respect.

4. Successors. This Conservation Easement is binding upon, and inures to the benefit of the parties, their administrators, successors and assigns, and continues as a servitude running in perpetuity with the Land. Nothing in this instrument may be construed as precluding the Landowner's ability to conduct its business or own the Land as a partnership, limited partnership, corporation, limited liability company, trust, estate, other generally recognized business entity, provided the purpose of such entity is not to circumvent the purposes of this Conservation Easement or the rights of the Department under this Conservation Easement as set forth in this instrument.

5. Termination of Rights and Obligations. A party's rights and obligations under this Conservation Easement terminate upon transfer of the party's interest in the Conservation Easement or Land, except that liability for acts or omissions occurring prior to transfer survive transfer.

6. Severability. If any provision of this Conservation Easement is found to be invalid, the remainder of the provisions of this Conservation Easement are not be affected.

TO HAVE AND TO HOLD unto the Department, its successors, and assigns forever.

IN WITNESS WHEREOF, Landowner and the Department have set their hands on the day and year first above written.

LANDOWNER:
State of Montana, Department of Natural Resources
And Conservation

Judy Martz, Governor

Attest Bob Brown
Bob Brown, Secretary of State

MONTANA DEPARTMENT OF FISH, WILDLIFE
AND PARKS

By M. Jeff Hagener
M. Jeff Hagener, Director

State of Montana )
:ss.
County of Lewis and Clark )

This instrument was acknowledged before me on March 15, 2004, by M. Jeff Hagener, as director of the Montana Department of Fish, Wildlife and Parks.

(SEAL)

Deborah J. Dils
Notary Public for the State of Montana
Deborah J. Dils
Print
Residing at Montana City, Montana
My commission expires 03/11/08 - March 11, 2008

# Montana Legislative Services Division

## Legal Services Office

March 29, 2007

Senator Aubyn Curtiss
PO Box 200500
Helena, Montana 59620-0500

Dear Senator Curtiss:

I am writing in response to your request for an opinion as to the legality of the Legislature authorizing the placement of conservation easements on school trust lands. Section 76-6-104, MCA, defines a "conservation easement" as an easement or restriction, running with the land and assignable, under which an owner of land voluntarily relinquishes to the holder of the easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction. Section 76-6-202, MCA, provides that conservation easements may be granted either in perpetuity or for a term of years. Section 76-6-203, MCA, provides that conservation easements may prohibit or limit any or all of eight enumerated uses of the land. A conservation easement is not a traditional type of easement.
An easement is a grant of the use of and not a grant of title to the land. An easement is a servitude attached to the land. See section 70-17-101, MCA, and Bolinger v. City of Bozeman, 158 Mont. 507, 493 P.2d 1062 (1972). Section 70-17-106, MCA, provides that the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. An easement is a "property right" protected by constitutional guarantees against the taking of private property without just compensation. City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212 (1950). In Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941), the Montana Supreme Court defined an easement as a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon land. By contrast, a conservation easement is not designed to permit a use of land, but to prohibit certain uses of land. A conservation easement may be described as the sale of the right to change the existing use of the land or a sale of the right to develop the land.

The 2001 Legislature authorized the placement of conservation easements on state land by enacting Senate Bill No. 159, as Chapter 230, Laws of 2001. That law amended section 77-2-101, MCA, authorizes the Board of Land Commissioners to grant conservation easements on state land to the Department of Fish, Wildlife, and Parks for parcels that are surrounded by or adjacent to land owned by the department as of January 1, 2001, to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001, and to a nonprofit corporation for the Owen Sowerwine Natural Area located within in Flathead County.

In addition, section 77-2-319, MCA, requires the Board of Land Commissioners to grant to the state a conservation easement for cabin sites, home sites, or city or town lots sold pursuant to section 77-2-318, MCA. The granting of the conservation easement to the state on the land sold is conditioned upon that action being consistent with the Board's trust responsibility. Those conservation easements are required to run with the land in perpetuity and must prohibit subdivision of the land, lake, or stream and for property within 100 feet of a river, stream, or lake, prohibit the cutting of trees except as necessary for construction on the lot, fire prevention, safety, or protection of personal property, and require that any permanent structure be set back 25 feet from the high-water mark of a lake or stream. The conservation easement requirements for the sale of state land were authorized by the 1989 Legislature by enacting Senate Bill No. 91 as Chapter 602, Laws of 1989.

Article X, section 11(2), of the Montana Constitution provides that state land or any estate or interest in state land may not be disposed of except in pursuance of general laws or until the full market value of the interest disposed of, determined as provided by law, is paid to or secured to the state. Section 77-2-106, MCA, requires the Board of Land Commissioners to charge and collect the full market value of the estate or interest disposed of through the granting of any easement and to fix, charge, and collect the amount of the actual damages resulting to the remaining land from the granting of an easement as nearly as the damages can be ascertained. The Board is also authorized to accept in-kind payments of services and materials equal to the full market value of any easement upon state trust land. Pursuant to the existing statutes and any statutes that might be enacted by the 60th Legislature, the Board of Land Commissioners is required to receive full market value for the conservation easement that is granted on state land. While the valuation of the "development rights" disposed of by the granting of a conservation easement may be difficult, that does not make the grant illegal. For example, see Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 Mont. 105, 119 P.3d 27 (2005), in which the Montana Supreme Court upheld the methodology for determining the "current market value" of a future stream of a future mineral royalty stream. So long as full market value for the conservation easement is received by the state, there is no constitutional impediment to granting a conservation easement on state land.

In your letter you also reference perpetuities, so I will also address that issue. This will give me the opportunity to relive a painful part of my law school experience. Article XIII, section 6, of the Montana Constitution provides, "No perpetuities shall be allowed except for charitable purposes". This provision was carried forward unchanged from the 1889 Montana Constitution. The case of In re Swayze's Estate, 120 Mont. 546, 191 P.2d 322 (1948), indicates that the constitutional provision is based upon the "Rule Against Perpetuities". The Rule Against Perpetuities is a common law principle prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years, plus a period of gestation to cover a posthumous birth, after the death of some person alive when the interest was created. Under the common-law rule, the test is not whether an interest actually will vest more than 21 years after the life in being, but if there exists any possibility at the time of the grant, however unlikely, that an interest will vest outside of the perpetuities period, the interest is void and is stricken from the grant. I will refrain from discussing corollary issues such as mortmain, the fertile octogenarian

rule, and the unborn widow problem. The need to discuss these mind-bending complexities is unnecessary, because Montana has adopted the Uniform Statutory Rule Against Perpetuities, Title 72, chapter 2, part 10, MCA. The Uniform Statutory Rule Against Perpetuities was devised in order to avoid the complexities of the common law rule and to put clearer limits on the period of time and who is affected by the rule. Section 72-2-1002(1), MCA, modifies the common-law rule by providing that a nonvested property interest is invalid unless: (a) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (b) the interest either vests or terminates within 90 years after its creation.

In any event, it does not appear that the Rule Against Perpetuities would apply to a conservation easement that is granted in perpetuity, because the easement "vests" in the entity purchasing the easement at the time of the transaction.

I hope that I have adequately addressed your question. If you have additional questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

cc: Senator Dave Lewis
Senator Verdell Jackson

Cl0429 7089gpxa.

SENATE BILL NO. 391

INTRODUCED BY D. WEINBERG

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING RESTRICTIONS ON CONSERVATION EASEMENTS ON STATE LAND; PROVIDING FOR THE TERM OF CONSERVATION EASEMENTS ON STATE LAND; PROVIDING THAT TRADITIONAL CLASSIFIED USES MAY BE MAINTAINED; PROVIDING THAT A CONSERVATION EASEMENT ON STATE LAND MAY BE HELD BY A GOVERNMENTAL ENTITY ~~OR A QUALIFIED PRIVATE ORGANIZATION~~; AND AMENDING SECTION 77-2-101, MCA."

WHEREAS, citizens of the State of Montana value the preservation of traditional uses on school trust lands of grazing, farming, timber harvest, and general recreation; and

WHEREAS, if a conservation easement was purchased on school trust land, the public would get to examine and comment on that agreement to see how traditional uses are affected before the easement was finalized; and

WHEREAS, if valuable school trust lands are sold, the traditional uses on these lands could be lost; and

WHEREAS, the Department of Natural Resources and Conservation is charged with managing the state's school trust lands in a manner that derives revenue for the support of the common schools, the University System, and other state institutions; and

WHEREAS, the Department of Natural Resources and Conservation is currently working to increase the revenue earned from school trust lands by diversifying existing uses on school trust lands; and

WHEREAS, conservation easements are an effective tool available to protect these traditional uses while preserving the long-term value of trust lands and retaining the trust land base; and

WHEREAS, the money raised from the purchase of conservation easements on school trust lands is deposited in a nondistributable permanent trust, the interest of which can be used to benefit schools and other trust beneficiaries; and

WHEREAS, the money invested from the purchase of a conservation easement plus the money derived from annual leases or licenses for traditional uses can make traditional uses more financially lucrative for the schools and other trust beneficiaries.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

1

2 **Section 1.** Section 77-2-101, MCA, is amended to read:

3 **"77-2-101. Easements for specific uses.** (1) Upon proper application as provided in 77-2-102, the
4 board may grant easements on state lands for the following purposes:

5 (a) schoolhouse sites and grounds;

6 (b) public parks;

7 (c) community buildings;

8 (d) cemeteries;

9 (e) conservation purposes as provided in subsection (3)~~:~~

10 ~~(i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land~~
11 ~~owned by the department of fish, wildlife, and parks as of January 1, 2001;~~

12 ~~(ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same~~
13 ~~nonprofit corporation as of January 1, 2001; and~~

14 ~~(iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township~~
15 ~~28 north, range 21 west, in Flathead County~~; and

16 (f) for other public uses.

17 (2) The board may grant easements on state lands for the following purposes:

18 (a) right-of-way across or upon any portion of state lands for any public highway or street, any ditch,
19 reservoir, railroad, private road, or telegraph or telephone line, or any other public use as defined in 70-30-102;
20 or

21 (b) any private building or private sewage system that encroaches on state lands.

22 (3) (a) A conservation easement granted pursuant to this section:

23 (i) may be granted ~~in perpetuity or~~ for a term ~~of~~ NOT TO EXCEED 50 years, AND THE DEPARTMENT SHALL
24 REAPPRAISE THE VALUE OF THE CONSERVATION EASEMENT EVERY 10 YEARS AND ADJUST THE EASEMENT PAYMENT TERMS
25 TO BE COMMENSURATE WITH CURRENT VALUE OF THE EASEMENT;

26 (ii) may be held only by a governmental entity ~~or a qualified private organization, as defined in 76-6-104;~~
27 and

28 (iii) must be subject to 77-2-304.

29 (b) ~~Unless the board provides a compelling reason, conservation easements should~~ THE BOARD SHALL
30 PROVIDE COMPELLING EVIDENCE THAT CONSERVATION EASEMENTS GRANTED PURSUANT TO THIS SECTION COMPLY WITH

1 THE MULTIPLE-USE MANAGEMENT CONCEPT PROVIDED FOR IN 77-1-203 AND allow:

2 (i) traditional classified uses described in 77-1-401, including timber, grazing, and agricultural uses that

3 were in place prior to the easement being issued; and

4 (ii) general recreation uses, as provided in Title 77, chapter 1, part 8, THAT WERE IN PLACE PRIOR TO THE

5 EASEMENT BEING ISSUED.

6 (C) THE TOTAL ACREAGE OF LAND UNDER CONSERVATION EASEMENTS PURSUANT TO THIS SECTION, EXCLUDING

7 CONSERVATION EASEMENTS NEGOTIATED PRIOR TO [THE EFFECTIVE DATE OF THIS ACT], MAY NOT EXCEED 25,000 ACRES."

8 - END -

GOVERNOR'S OFFICE OF BUDGET AND PROGRAM PLANNING

# Fiscal Note 2009 Biennium

| | | | |
|---|---|---|---|
| **Bill #** | SB0391 | **Title:** | Conservation easements on state land |
| **Primary Sponsor:** | Weinberg, Dan | **Status:** | As Introduced-Revised |

- ☐ Significant Local Gov Impact
- ☐ Needs to be included in HB 2
- ☐ Technical Concerns
- ☐ Included in the Executive Budget
- ☐ Significant Long-Term Impacts
- ☐ Dedicated Revenue Form Attached

## FISCAL SUMMARY

| | FY 2008 Difference | FY 2009 Difference | FY 2010 Difference | FY 2011 Difference |
|---|---|---|---|---|
| **Expenditures:** | | | | |
| General Fund (01) | $0 | ($76,498) | ($118,209) | ($157,994) |
| Common School Guarantee Acct (02) | $0 | $76,498 | $118,209 | $157,994 |
| **Revenue:** | | | | |
| General Fund | $0 | $0 | $0 | $0 |
| Common School Guarantee Acct (02) | $0 | $76,498 | $118,209 | $157,994 |
| Common School Perm Trust (09) | $612,557 | $820,769 | $822,965 | $825,058 |
| University System (71) | $0 | $4,109 | $6,349 | $8,485 |
| University System Perm Trust (09) | $31,254 | $41,672 | $41,672 | $41,672 |
| School for the Deaf and Blind (02) | $0 | $634 | $797 | $1,309 |
| School for the Deaf and Blind Perm Trust (09) | $4,822 | $6,429 | $6,429 | $6,429 |
| State Reform School (02) | $0 | $1,179 | $1,821 | $2,434 |
| State Reform School Perm Trust (09) | $8,966 | $11,954 | $11,954 | $11,954 |
| Veterans Home (02) | $0 | $22 | $34 | $46 |
| Veterans Home Perm Trust (09) | $169 | $225 | $225 | $225 |
| Public Buildings Perm Trust (09) | $24,732 | $32,976 | $32,976 | $32,976 |
| **Net Impact-General Fund Balance:** | $0 | $76,498 | $118,209 | $157,994 |

**Description of fiscal impact:**

SB 391 authorizes the Department of Natural Resources and Conservation (DNRC) to sell conservation easements on interests in state lands. DNRC has completed a programmatic plan that includes the sale of partial interests in state lands.

# FISCAL ANALYSIS

**Assumptions:**

**Department of Natural Resources and Conservation (DNRC)**

1. The DNRC anticipates that the residential, commercial, and industrial interests sold as conservation easements as described in the programmatic plan would represent approximately 910 acres of state trust land on an annual basis.
2. The average land value of the 910 acres is approximately $2,000 per acre or $1,820,000 per year. Gross revenue from the interest is estimated at 50 percent of the per-acre value or $910,000 per year.
3. Costs associated with the issuance of conservation easements would be expensed from existing spending authority in DNRC.
4. The revenue from the conveyance of conservation easements will be allocated to the permanent trusts of the appropriate trust beneficiaries. For fiscal note purposes, the gross revenue was allocated based on surface acreage of the trusts. The following table shows the increase in revenue to the appropriate trust beneficiaries. The bill is effective October 1, 2008, so only ¾ of the yearly land value estimate is used.

**Yearly Permanent Trust Easement Revenue**

| Beneficiaries | FY 2008 | FY 2009 - FY 2011 |
|---|---|---|
| Common School Permanent Trust (09) | $612,557 | $816,743 |
| University System Permanent Trust (09) | $31,254 | $41,672 |
| School for the Deaf and Blind Permanent Trust (09) | $4,822 | $6,429 |
| State Reform School Permanent Trust (09) | $8,966 | $11,954 |
| Veterans Home Permanent Trust (09) | $169 | $225 |
| Public Buildings Permanent Trust (09) | $24,732 | $32,976 |
| **Total** | $682,499 | $910,000 |

5. The permanent trusts earn interest revenue that is distributable, except for the common school permanent trust revenue. Ninety-five percent of this revenue is distributable and allocated to the guarantee fund and the remaining 5% is deposited back into the permanent trust. It is assumed that interest income will be generated starting in FY 2009. The following table shows the interest revenue allocation.

**Increased Interest Earnings from SB 391**

| | FY 2009 | FY 2010 | FY 2011 |
|---|---|---|---|
| Common School Guarantee Account (02) | $76,498 | $118,209 | $157,994 |
| Common School Permanent Trust (09) | $4,026 | $6,222 | $8,315 |
| University System (71) | $4,109 | $6,349 | $8,485 |
| School for the Deaf and Blind (02) | $634 | $979 | $1,309 |
| State Reform School (02) | $1,179 | $1,821 | $2,434 |
| Veterans Home (02) | $22 | $34 | $46 |
| **Total** | $86,467 | $133,614 | $178,584 |

6. The guarantee fund is the first funding source for school BASE aid. The increased revenue will increase statutorily appropriated guarantee fund expenditures for school BASE aid and offset general fund expenditures.

| | FY 2008 Difference | FY 2009 Difference | FY 2010 Difference | FY 2011 Difference |
|---|---|---|---|---|
| **Fiscal Impact:** | | | | |
| **Expenditures:** | $0 | $0 | $0 | $0 |
| **TOTAL Expenditures** | $0 | $0 | $0 | $0 |
| **Funding of Expenditures:** | | | | |
| General Fund (01) | $0 | ($76,498) | ($118,209) | ($157,994) |
| Common School Guarantee Acct (02) | $0 | $76,498 | $118,209 | $157,994 |
| **TOTAL Funding of Exp.** | $0 | $0 | $0 | $0 |
| **Revenues:** | | | | |
| General Fund (01) | $0 | $0 | $0 | $0 |
| Common School Guarantee Acct (02) | $0 | $76,498 | $118,209 | $157,994 |
| Common School Perm Trust (09) | $612,557 | $820,769 | $822,965 | $825,058 |
| University System (71) | $0 | $4,109 | $6,349 | $8,485 |
| University System Perm Trust (09) | $31,254 | $41,672 | $41,672 | $41,672 |
| School for the Deaf and Blind (02) | $0 | $634 | $797 | $1,309 |
| School for the Deaf and Blind Perm Trust (09) | $4,822 | $6,429 | $6,429 | $6,429 |
| State Reform School (02) | $0 | $1,179 | $1,821 | $2,434 |
| State Reform School Perm Trust (09) | $8,966 | $11,954 | $11,954 | $11,954 |
| Veterans Home (02) | $0 | $22 | $34 | $46 |
| Veterans Home Perm Trust (09) | $169 | $225 | $225 | $225 |
| Public Buildings Perm Trust (09) | $24,732 | $32,976 | $32,976 | $32,976 |
| **TOTAL Revenues** | $682,500 | $963,491 | $1,010,455 | $1,055,606 |
| **Net Impact to Fund Balance (Revenue minus Funding of Expenditures):** | | | | |
| General Fund (01) | $0 | $76,498 | $118,209 | $157,994 |
| Common School Guarantee Acct (02) | $0 | $0 | $0 | $0 |
| Common School Perm Trust (09) | $612,557 | $820,769 | $822,965 | $825,058 |
| University System (71) | $0 | $4,109 | $6,349 | $8,485 |
| University System Perm Trust (09) | $31,254 | $41,672 | $41,672 | $41,672 |
| School for the Deaf and Blind (02) | $0 | $634 | $797 | $1,309 |
| School for the Deaf and Blind Perm Trust (09) | $4,822 | $6,429 | $6,429 | $6,429 |
| State Reform School (02) | $0 | $1,179 | $1,821 | $2,434 |
| State Reform School Perm Trust (09) | $8,966 | $11,954 | $11,954 | $11,954 |
| Veterans Home (02) | $0 | $22 | $34 | $46 |
| Veterans Home Perm Trust (09) | $169 | $225 | $225 | $225 |
| Public Buildings Perm Trust (09) | $24,732 | $32,976 | $32,976 | $32,976 |

*Sponsor's Initials* *Date* *Budget Director's Initials* *Date*

## 2005 Montana Legislature

About Bill -- Links

SENATE BILL NO. 97

INTRODUCED BY BARKUS

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE DISPOSITION OF SPECIALIZED INTERESTS IN STATE LANDS BY RESTRICTING ANY OR ALL RIGHTS TO CONSTRUCT IMPROVEMENTS UPON THE LAND OR TO SUBSTANTIALLY ALTER THE NATURAL CHARACTER OF THE LAND EXCEPT AS THESE RIGHTS ARE EXPRESSLY RESERVED IN THE INSTRUMENTS INDICATING THE RESTRICTION; AMENDING SECTIONS 77-2-301 AND 77-2-343, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 77-2-301, MCA, is amended to read:

**"77-2-301. Sales of state land under board control.** The board may decide when sales of state land are to be held, what type of property interests may be conveyed, and what state lands are to be offered for sale, subject to the limitations of this title, as the best interests of the state may appear to require."

**Section 2.** Section 77-2-343, MCA, is amended to read:

**"77-2-343. Patent provisions -- conveyance of property interests.** (1) ~~Such~~ The deed or patent ~~shall contain the reservation of~~ must state that it is subject to prior existing reservations, including easements for rights-of-way ~~to~~ held by the United States~~,~~ and reservation of all minerals in the land as provided in 77-2-304, ~~and all other reservations to which the particular land conveyed is subject~~ and must describe the extent of the property interests or rights conveyed to the grantee.

(2) If the land is located within the boundaries of a federal irrigation project, the patent ~~shall~~ must contain a lien clause substantially in the following form: The land ~~hereby~~ conveyed is located within the boundaries of a federal irrigation project and is subject to all liens ~~which~~ that the United States may have ~~thereon~~ on the land by reason of its being located ~~under such~~ within the irrigation project.

(3) This section does not require any reservation in a patent ~~which~~ that was not an express or implied reservation in the certificate of purchase pursuant to which the patent is issued. The statutes in effect when ~~such~~ the certificate of purchase was issued ~~must~~ govern.

(4) (a) Except as provided in subsection (4)(b), the board may permanently convey less than fee simple

property interests in state land FOR THE PURPOSE OF RESTRICTING ANY OR ALL RIGHTS TO CONSTRUCT IMPROVEMENTS UPON THE LAND OR TO SUBSTANTIALLY ALTER THE NATURAL CHARACTER OF THE LAND EXCEPT AS THESE RIGHTS ARE EXPRESSLY RESERVED IN THE INSTRUMENTS INDICATING THE RESTRICTION. The board, in compliance with and as limited by other provisions of state law, may convey ~~partial, limited, fractional, or undivided~~ property interests ~~in~~ TO RESTRICT ACTIVITIES ON state lands as the board may determine is in the best interests of the affected state trust beneficiary.

(b) A conveyance under subsection (4)(a) MAY RESTRICT RESIDENTIAL, COMMERCIAL, AND INDUSTRIAL USES BUT may not affect the state's ability to MANAGE, develop, or lease state land for OTHER PURPOSES, ~~OTHER THAN RESIDENTIAL, COMMERCIAL, AND INDUSTRIAL,~~ INCLUDING BUT NOT LIMITED TO RECREATION, grazing, agricultural, or timber purposes or to retain state water and mineral rights.

(c) The conveyance of any property interest in state lands for a term of years must be in accordance with the provisions of Title 77 relating to leases or licenses.

(D) BEFORE THE BOARD APPROVES THE RESTRICTION OF RIGHTS TO CONSTRUCT IMPROVEMENTS UPON THE LAND OR TO SUBSTANTIALLY ALTER THE NATURAL CHARACTER OF THE LAND, THE DEPARTMENT SHALL NOTIFY ALL PERSONS HOLDING A LICENSE OR LEASE ON THE PARCEL.

(E) THE GRANTEE MUST BE CONSULTED PURSUANT TO 75-1-201 AND 75-1-208 PRIOR TO THE FUTURE MANAGEMENT OF THE LAND ENCUMBERED BY THE CONVEYANCE.

(F) EACH CONVEYANCE DOCUMENT MUST CONTAIN PROVISIONS NECESSARY TO ENSURE THAT THE GRANTEE'S RIGHTS ARE RESTRICTED."

NEW SECTION. **Section 3. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

- END -

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**Latest Version of SB 97** *(SB0097.03)*

Processed for the Web on January 21, 2005 (5:02pm)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted.

See the status of this bill for the bill's primary sponsor.

Status of this Bill | 2005 Legislature | Leg. Branch Home

This bill in WP 5.1 | All versions of all bills (WP 5.1 format)

Authorized print version w/line numbers (PDF format)

[ NEW SEARCH ]

Prepared by Montana Legislative Services

(406) 444-3064

# FISCAL NOTE

**Bill #:** SB0097 **Title:** Clarify authority to dispose of residential, commercial, and industrial interests in state trust land

**Primary Sponsor:** Barkus, G **Status:** As Introduced

Sponsor signature Date David Ewer, Budget Director Date

## Fiscal Summary

| | FY 2006 Difference | FY 2007 Difference |
|---|---|---|
| **Expenditures:** | | |
| General Fund | $0 | ($47,998) |
| State Special Revenue | $0 | $47,998 |
| **Revenue:** | | |
| State Special Revenue | $0 | $51,727 |
| Capital Projects Revenue | $0 | $2,040 |
| Trust Revenue | $910,000 | $912,526 |
| **Net Impact on General Fund Balance:** | $0 | $47,998 |

- ☐ Significant Local Gov. Impact
- ☐ Included in the Executive Budget
- ☐ Dedicated Revenue Form Attached
- ☐ Technical Concerns
- ☒ Significant Long-Term Impacts
- ☐ Needs to be included in HB 2

## Fiscal Analysis

ASSUMPTIONS:

1. This bill would give the Department of Natural Resources and Conservation (DNRC) the authority to sell partial interests in state lands. DNRC has completed a programmatic Environmental Impact Statement process to develop a management plan that includes sale of partial interests in state lands but has not identified particular parcels where partial interests would be offered for sale.

**Department of Natural Resources and Conservation**

2. The department anticipates that the residential, commercial, and industrial interests sold as described in the Programmatic Environmental Impact Statement would represent approximately 910 acres of state trust land on an annual basis.
3. The average land value of the 910 acres is approximately $2,000 per acre or $1,820,000 per year. Gross revenue from the interests is estimated at 50 peer cent of the per acre value or $910,000 per year.
4. Advertising costs for marketing the residential, commercial, and industrial interests would be expensed from existing spending authority in House Bill 2.

**Fiscal Note Request SB0097, As Introduced**
(continued)

5. The revenue from the conveyance of residential, commercial, and industrial interests is considered non-distributable and would be allocated to the permanent funds of the appropriate trust beneficiaries. For fiscal note purposes, the gross revenue was allocated based on surface acreage of the trusts as follows:

| Beneficiaries | Non-Distributable Revenue FY06/07 |
|---|---|
| Common School | $816,743 |
| Univ. of Montana | 3,272 |
| MSU-Morrill | 11,189 |
| MSU-Second | 5,541 |
| MT Tech | 10,481 |
| Normal School | 11,189 |
| Deaf & Blind | 6,429 |
| Reform School | 11,954 |
| Veterans Home | 225 |
| Public Buildings | 32,976 |
| **Total** | **$910,000** |

**Office of Budget and Program Planning:**

6. Proceeds from the first sales of partial interests in state lands will be deposited in the trust funds near the end of FY 2007. The average balances in the trusts in FY 2007 will be increased by the amounts shown in the table in assumption 5.
7. New deposits to the trust funds will earn interest at 6.186% in FY 2007 The trust beneficiaries will receive additional interest income as shown in the following table:

**Increased Interest Earnings FY 2007**

| Beneficiaries | Revenue |
|---|---|
| Common School (02/9) | $50,524 |
| Univ. of Montana (02) | $202 |
| MSU-Morrill (02) | $692 |
| MSU-Second (02) | $343 |
| MT Tech (02) | $648 |
| Normal School (02) | $692 |
| Deaf & Blind (02) | $398 |
| Reform School (02) | $739 |
| Veterans Home (02) | $14 |
| Public Buildings (05) | $2,040 |
| **Total** | **$56,293** |

**Office of Public Instruction**

8. 95% of the Common school trust interest earnings will be deposited in the guarantee fund (0.95 times 50,524 = 47,998). The remaining 5% or $2,526 will be deposited into the trust.

9. The guarantee fund is statutorily appropriated to school base aid. Increased revenue will increase guarantee fund expenditures and offset general fund expenditures.

FISCAL IMPACT:

| | FY 2006 Difference | FY 2007 Difference |
|---|---|---|
| Funding of Expenditures: | | |
| General Fund (01) | $0 | ($47,998) |
| State Special Revenue (02) | 0 | 47,998 |
| TOTAL | $0 | $0 |
| Revenues: | | |
| State Special Revenue (02) | $0 | $51,727 |
| Capital Projects (05) | 0 | 2,040 |
| Trust Funds (09) | 910,000 | 912,526 |
| TOTAL | $910,000 | $966,293 |
| Net Impact to Fund Balance (Revenue minus Funding of Expenditures): | | |
| General Fund (01) | $0 | $47,998 |
| State Special Revenue(02) | $0 | $3,729 |
| Capital Projects (05) | $0 | $2,040 |
| Trust Funds (09) | $910,000 | $912,526 |

LONG-RANGE IMPACTS:
Revenue from sales of partial interests in state trust lands in FY 2007 and later years will be deposited in the trust fund. This will result in further increases in interest earnings in FY 2008 and later years.

Department of Natural Resources and Conservation

| EASEMENTS | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Easement Holder | Term | Acres | Purpose | Per Acre Fee/Total Annual Fee | County | Date | Deed | Legal Description |
| FWP | Perpetuity with Reversionary clause | 16.98 | Public recreation and wildlife | $849 | Park | 6/28/1963 | D-4600 | 4S 9E 16 |
| FWP | Perpetuity with Reversionary clause | 19 | Wildlife management and public recreation | $190.00 | Mineral | 5/16/1967 | D-5565 | 14N 24W 8 |
| FWP | Perpetuity with Reversionary clause | 5 | Wildlife management and public recreation | $50.00 | Mineral | 5/16/1967 | D-5566 | 14N 25W 36 |
| FWP | Perpetuity with Reversionary clause | 13 | Wildlife management and public recreation | $130.00 | Missoula | 5/16/1967 | D-5567 | 11N 20W 36 |
| FWP | Perpetuity with Reversionary clause | 7.3 | Wildlife management and public recreation | $73.00 | Sanders | 1/16/1968 | D-5568 | 22N 30W 36 |
| FWP | Perpetuity with Reversionary clause | 6.7 | Wildlife management and public recreation | $67.00 | Flathead | 5/16/1967 | D-5569 | 28N 25W 36 |
| FWP | Perpetuity with Reversionary clause | 267.8 | Preserve and protect Blackfoot River system. | $34,375 | Missoula | 11/2/1983 | D-8089 | Portions of 15N 14W 36, 14N 14W 16, 14N 14W 10, 14N 16W 22 |
| Custer Battlefield Preservation Committee | Perpetuity with Reversionary clause | 320 | Preserve and protect property. | $4,800 | Big Horn | 7/20/1989 | D-8944 | 3S 35E 16 |
| Custer Battlefield Preservation Committee | Perpetuity with Reversionary clause | 320 | Preserve and protect property. | $4,000.00 | Big Horn | 7/20/1989 | D-8963 | 3S 35E 36 |
| FWP | Perpetuity with Reversionary clause | 6,849 | Preserve, protect and enhance land. Blackfoot Clearwater Wildlife Management Area | $1,598,965.00 | Missoula, Powell | 4/15/2004 | D-11003 | Portions of 15N 14W 1,12,13,14,24,36; 16N 14W 32,34, 35, 36; 15N R13W, 6,7,16; 16N 13W, 20, 28, 29,, 31, 32, 33 |
| MDOT | Perpetuity with Reversionary clause | 31.31 | Wetland preservation | $156,600.00 | Deer Lodge | 12/22/2005 | D-11722 | 2N 13W 36 |
| MDOT | Perpetuity with Reversionary clause | 16.32 | Wetland preservation | $5,264.00 | Carter | 12/26/2001 | D-10437 | 9S 58E 36 |
| MDOT | Perpetuity with Reversionary clause | 8.53 | Wetland preservation | $2,985.50 | Richland | 7/15/2003 | D-10727 | 24N 58E 16 |
| FWP | 5 year Option agreement to purchase a perpetual easement with reversionary clause | 418 | annual option payment of $11,704 State Park | $334,300.00 | Cascade | 7/11/2007 | | NE 20N1E 12, NW,N1/2SW, SWSW 20N, 2E, 7 |
| TOTAL | | 8298.94 | | $2,142,648.50 | | | | |
| | Acquisitions with Conservation Easements in Place | | | | | | | |
| Purchaser | | | | | | | | |
| DNRC/St. of Mt | Perpetual conservation easement | 1438.97 | Easement precludes residential development | $564,088 | Powell | 12/7/2007 | | Portions of Sections 4,5,9 T15N, R12W |

RIGHT OF WAY APPLICATION NO. 5323
AFFECTING LOT 4(SE¼SW¼), SEC. 16,
TWP. 4S, RGE. 9E, PARK COUNTY, MONTANA.

Form R. 40—131

No. D-4600

# RIGHT OF WAY DEED

CORRECTIVE DEED

737

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF MONTANA

To All To Whom These Presents Shall Come:

Know ye that the State of Montana, in consideration of the sum of EIGHT HUNDRED FORTY NINE AND NO/100 Dollars now paid, grants to MONTANA FISH AND GAME COMMISSION a right of way for a PUBLIC RECREATION AND WILDLIFE CONSERVATION upon and across state lands, as follows:

A tract or strip of land affecting Lot 4, (SE¼SW¼), Section 16, Township 4 South, Range 9 East, Montana Principal Meridian, Park County, Montana, more particularly described as follows:

Commencing at the Section Corner common to Sections 16, 17, 20, 21, Township 4 South, Range 9 East, Montana Principal Meridian, Park County, Montana, thence East 00° 00' along the section line between Sections 16 and 21 a distance of 1792.43 feet, crossing the Northern Pacific Railway Park Branch, and the proposed U. S. Highway No. 89 as surveyed to the true point of beginning, said point being on the East right-of-way line of said highway, thence North 11° 42' East along said highway East right-of-way a distance of 34.1 feet to a point, said point being right-of-way Station 1156+50, thence North 26°10'39" East along said highway East right-of-way a distance of 200.0 feet to a point, said point being right-of-way Station 1158+50, thence North 11° 42' East along said highway East right-of-way a distance of 450.0 feet to a point, said point being right-of-way Station 1163+00, thence North 02° 46' 39" West along said highway East right-of-way a distance of 200.00 feet to a point, said point being right-of-way Station 1165+00, thence North 11° 42' East along said highway East right-of-way a distance of 476.5 feet to a point, said point at the intersection of said highway East right-of-way and the North line of Lot 4, Section 16, thence East 00° 00' along the said North line of Lot 4 a distance of 270.0 feet to a point, said point being on the West bank of the Yellowstone River, thence on a meander line South 10° 26' West a distance 200.0 feet, South 06° 00' East a distance 300.0 feet, South 28° 30' East a distance 400.0 feet, South 39° 00' East a distance 300.0 feet, South 40° 00' East a distance 100.0 feet, South 40° 08' East a distance 200.0 feet to a point, said point being at the intersection of the meander line and the section line between Sections 16 and 21, thence west 00° 00' along said section line a distance of 1115.47 feet to the true point of beginning, said tract of land contains 16.98 acres more or less.

This right of way is given to correct an error in description in the original deed, dated July 10, 1962, and recorded August 23, 1962, in Book 104 of Deeds, at Page 116, Records of Park County, Montana.

It is further Provided that whenever said lands herein granted as a right of way shall cease to be used for such purpose, the same shall revert to the state upon notice to that effect being given to the said grantee named herein.

IN TESTIMONY WHEREOF, the State of Montana has caused these presents to be executed by the Governor, and to be attested by the Secretary of State, and countersigned by the Commissioners of State Lands and Investments, and the Great Seal of the State, and the Seal of the State Board of Land Commissioners to be hereunto affixed this TWENTY-EIGHTH day of JUNE A. D. 19 63.

TIM BABCOCK
Governor of the State of Montana

ATTEST:

FRANK MURRAY
Secretary of State

Countersigned by

MONS L. TEIGEN
Commissioner of State Lands and Investments

GREAT SEAL OF MONTANA

SEAL OF STATE BOARD OF LAND COMMISSIONERS

NO. D-8089

RIGHT OF WAY DEED

CONSERVATION EASEMENT

IN THE NAME AND BY THE AUTHORITY OF THE
STATE OF MONTANA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

Know ye that the State of Montana, in consideration of the sum of -------$34,375.00------- dollars now paid, grants to Montana Department of Fish, Wildlife and Parks a right of way and easement for a conservation easement as described and explained herein, upon and across state lands, as follows:

SEE Exhibit "A" attached hereto and made a part hereof for all purposes.

WHEREAS, Grantor is the owner of certain real property in Missoula County, Montana (hereinafter described and hereinafter referred to as "Grantor's Land"); and

WHEREAS, portions of Grantor's Land currently remain in a substantially undisturbed, natural state and have significant ecological, scenic and aesthetic values; and

WHEREAS, Grantor is the owner of certain other real property in Missoula County, west of the Blackfoot River in section 36, T15N, R14W which is not Grantor's Land as defined in this Conservation Easement and it is the intent and policy of the Grantor that this land remain in its present use; and

WHEREAS, Grantor's Land is inclusive of an important segment of the Blackfoot River, a natural area which represents a high quality example of a native ecosystem, and which has been rated a "highest value fishery resource" by the United States Fish and Wildlife Service and the Montana Department of Fish, Wildlife and Parks; and

WHEREAS, Grantor's Land is a valuable element of the Blackfoot River System which includes Grantor's Land, the Blackfoot River, its natural banks and channels, its waters, including ground water, its tributaries and its wetlands, and its aesthetic and ecological values, including flora, fauna and soils (all hereinafter collectively referred to as the "Blackfoot River System"); and

WHEREAS, Grantor's Land supports significant communities of native plants and provides important habitat for native wildlife; and

WHEREAS, portions of Grantor's Land contains frontage on the Blackfoot River and is a part of a larger ecological unit constituting the Blackfoot River System; and

WHEREAS, the protection of the ecological features and elements of the Grantor's Land is essential to the integrity of the Blackfoot River System and the flora and fauna they support; and

WHEREAS, all of these natural elements and ecological and aesthetic values are a great importance to the Grantor and to the people of the State of Montana and are worthy of preservation; and

WHEREAS, Grantor desires and intends that the natural elements and the ecological and aesthetic values of those portions of the Blackfoot River System within and upon Grantor's Land be preserved and maintained by the continuation of patterns of land use on the Grantor's Land as they have been historically conducted in harmony with the said natural elements and ecological and aesthetic features and values; and

WHEREAS, Grantor, as owner in fee of Grantor's Land, owns the affirmative rights to identify, to preserve and protect in perpetuity the natural elements and processes and the great aesthetic value of those portions of the Blackfoot River System within and upon Grantor's Land with the exception of oil and gas development rights which have been previously leased and may be leased in the future; and

WHEREAS, the Grantor desires and intends to transfer such rights to the Grantee with the exception of the oil and gas development rights which are reserved by the Grantor; and

WHEREAS, the State of Montana has recognized the importance of preservation of natural systems in the state by enactment of Section 76-6-101, et seq., Montana Codes Annotated; and

WHEREAS, the Grantee is a qualified organization under the terms of Section 76-6-101(4), Montana Codes Annotated; and

WHEREAS, Grantor agrees to bear all costs of operation, upkeep and maintenance of the Grantor's Land, and does hereby indemnify the Grantee therefor, save and except any and all costs associated with the obligation of the Grantee to honor and defend the intentions of the Grantor and to preserve and protect in perpetuity the natural ecological and aesthetic values of the Grantor's Land and the Blackfoot River System; and

WHEREAS, the Grantee agrees by acceptance of the grants herein forever to honor and defend the intentions of the Grantor stated herein to preserve and protect in perpetuity the natural ecological and aesthetic values of the Grantor's Land, and in connection therewith, the Blackfoot River System, provided, however, that Grantor intends that enforcement of the terms and provisions of this conservation easement shall be at that discretion of the Grantee, and any forbear-

ance on behalf of the Grantee to exercise its rights hereunder in the event of any breach hereof by Grantor, its successors or assigns, shall not be deemed or construed to be a waiver of the Grantee's rights hereunder in the event of any subsequent breach.

NOW THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, based upon the Common Law, and further, pursuant to Section 76-6-101, et seq., Montana Codes Annotated, Grantor does hereby convey to the State of Montana, Department of Fish, Wildlife and Parks, Grantee, with offices at the Fish and Game Building, Helena, Montana, a conservation easement consisting of the rights hereinafter enumerated, over and across that real property, situated in Missoula County, Montana (referred to herein as the "Grantor's Land"), more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof.

It is the purpose of this conservation easement to preserve and protect in perpetuity and to enhance, as may be mutually agreed upon, by restoration, the natural ecological and aesthetic features and values of those portions of the Blackfoot River System within and upon Grantor's Land. Specifically, and without limitation of the general purposes, it is the purpose hereof to preserve and protect, and to enhance, as may be mutually agreed upon, the soil composition structure and productivity, the native grasslands and timber and the native wildlife habitat, including the raptor nesting and roosting habitat, on the Grantor's Land and to preserve, protect and enhance as may be mutually agreed upon, all aspects of the water quality of those portions of the Blackfoot River System within and upon Grantor's Land. In so doing, it is the purpose of this conservation easement to foster the continuation of the responsible livestock grazing and timber management practices as they have been historically conducted in harmony with the ecological and aesthetic features and values of those portions of the Blackfoot River System within and upon Grantor's Land. In this regard, the Grantee acknowledges by its acceptance of this deed of conservation easement that as of the date of the deed of conservation easement, Grantor's historical and present use of the property subject to the easement is consistent with the purposes of this conservation easement as set forth in the preceding sentence with the exception of possible oil and gas development. The Grantee acknowledges by its acceptance of this deed of conservation easement that Grantor has granted oil and gas leases with development rights on Grantor's Land, that oil and gas exploration and development may occur on Grantor's Land at the sole discretion of the Grantor and Grantor reserves the right to issue oil

and gas leases and allow oil and gas exploration and development in the future. The parties hereto acknowledge that by mutual agreement, a collection of baseline data,more particularly described in Exhibit "B" attached hereto and by this reference made a part hereof, has been completed by Bruce A. Bugbee of Missoula, Montana. The parties acknowledge that said collection of baseline data is designed to assist in establishing the aforementioned condition of the property subject to this easement. Provided, however, that the parties acknowledge and agree that in the event a controversy arises with respect to the nature and extent of Grantor's historical and present use and physical condition of the property subject to this conservation easement, the parties shall not be foreclosed from utilizing all other relevant or material documents, surveys, reports, etc., to assist in the resolution of the controversy.

The rights conveyed by the conservation easement granted are the following:

1. To identify, to preserve and protect in perpetuity and to enhance by mutual agreement, the natural ecological and aesthetic features and values and the natural flora and fauna of the Grantor's Land and its water resources, which are a part of those portions of the Blackfoot River System within and upon Grantor's land.

2. To enter upon the Grantor's Land to enforce the rights herein granted, and to observe, study and make scientific observations of its ecosystems, upon prior written notice to Grantor, its successors or assigns, and in a manner that is reasonably consistent with the use of Grantor's Land by Grantors, its successors or assigns at the time of such entry.

3. To enjoin any activity on, or use of, the Grantor's Land which is inconsistent with the conservation easement granted and with the Grantor's intentions, and to enforce the restoration of such areas or features of the Grantor's Land as may be damaged by such activities.

Grantor intends that the conservation easement granted shall run with and burden title to the Grantor's Land in perpetuity and shall bind Grantor, its successors and assigns.

Grantor agrees to pay any and all real property taxes and assessments levied by competent legal authority on Grantor's land, except any tax or assessment on the easement herein granted.

Grantor futher intends that pursuant to the terms of Section 76-6-107, Montana Codes Annotated, the Grantor's Land preserved hereby as open space and natural land, may not be converted or directed to any uses other than those provided herein.

I

The following limitations on uses and practices shall apply to the entirety of the four tracts subject to this deed of conservation easement, to-wit;

A. Historical uses, such as timber management, livestock grazing, water use and development, oil and gas leasing with development rights, and the maintenance of existing right of way, shall be permitted to continue, subject only to the express limitations contained in this deed of conservation easement.

B. Timber and livestock management practices and oil and gas leasing and development shall be conducted according to responsible professional standards.

C. No new roadways shall be constructed except for those roadways necessary for the implementation of timber and livestock management practices and oil and gas leasing and development established in accordance with paragraph B above.

D. Improved sites for public non-residential recreational use shall be permitted only after obtaining the prior written approval of the Grantee, which approval shall not be unreasonably withheld.

E. With regard to any active or inactive bald eagle, golden eagle, or osprey nest, or other raptor nesting habitat on the Grantor's Land, known or later identified, Grantor specifically intends that this conservation easement shall prohibit the cutting or disturbance of any trees or other vegetation within 660 feet of any such nest, during the nesting season. Grantor further intends that this conservation easement shall prohibit the removal of any crown trees or other overstory vegetation, including the nesting trees themselves, within 330 feet of any active or inactive raptor nest, currently known or later identified, at any time, provided, however, that during the non-nesting season, diseased trees may be cut and removed to abate infestation. However, Grantor retains the discretion to permit any disturbance which is necessary to develop oil and gas resources.

F. Construction or placement of any structure which may be used either as a seasonal or permanent residence shall be prohibited.

G. Discharge of firearms or trapping shall be prohibited, except as approved by Grantee.

II

The following additional limitations on uses and practices shall apply to those portions of the four tracts subject to this deed of conservation easement designated as the "limited management zone". The "limited management zone" parallels and is immediately adjacent to the Blackfoot River in each of the four tracts, and is specifically delineated by the cross-hatch designation more

specifically appearing on the maps attached hereto, marked Exhibits "C", "D", "E" and "F", and incorporated herein by reference. Because the Blackfoot River forms the boundary of the "limited management zone" in Section 36, the zone includes the Blackfoot River and everything east thereof delineated by the cross-hatch designation.

The parties recognize and understand that the Grantor has previously granted oil and gas leases on Grantor's Land and may grant such leases in the future. Development of any existing oil or gas resources on Grantor's Land may occur in the sole discretion of the Grantor. To the extent that the following restrictions would prevent or hinder the development of those oil and gas resources, the restrictions do not apply. However, Grantor shall attempt to mitigate any oil and gas development related disturbances to the extent it determines to be reasonable and practical.

1. The establishment of new, permanent roadways shall be prohibited.

2. Vehicle use shall be limited to use on existing rights of way by government agency personnel or parties having a legal right to use the right of way. Grantor acknowledges in this grant of a deed of conservation easement that no right of way currently exists for use by the general public, with the exception of the right of way to an improved recreation site situated in the S½, Section 22, Township 14 North, Range 16 West. Grantor further acknowledges that the public has been afforded vehicular access to an improved recreation site in Section 22, and that that access may be continued, modified, or terminated, at the sole discretion of the Grantee.

Public off-road vehicular use shall be prohibited.

3. New structures or construction of improvements of any kind shall be prohibited, except utility structures such as power lines, pipe lines, and substations following a determination of the State Board of Land Commissioners, after considering the recommendations received from the Grantee, that such uses will allow the continued maintenance of and will be compatible with existing scenic, recreation, and other related conservation values which exist within the "limited management zone".

4. Development of improved recreation sites shall be prohibited except south of the Blackfoot River in the S½, Section 22, Township 14 North, Range 16 West. Development of an improved recreation site in the aforementioned location shall be subject to the written consent of the Grantee, which consent may not be unreasonably withheld.

5. In the event of deterioration or destruction of any existing fence or any new structure constructed in accordance with paragraph 4 above, any replace-

ment of the fence or structure shall be with a fence or structure of similar size, function, material and location.

6. Rip rapping or other disturbance or modification of the banks of the Blackfoot River shall be prohibited. This provision is not intended to impede the ability of Grantor or Grantee to remove or otherwise eliminate hazardous conditions.

7. The exploration for or extraction of all minerals, except oil and gas and the extraction of soils, sand or gravel, on or below the surface of Grantor's Land, shall be prohibited.

8. There shall be no cutting of trees, standing or down, nor clearing of any existing vegetation, except to remove trees or vegetation which are a hazard, to remove diseased trees, or to control insect infestations of immediate threat to adjacent timber.

9. Plant introduction or other use of non-native plants or animal species shall be prohibited except where such introduction is intended as a biological control against introduced pest species. Introduction shall be subject to the Grantee's prior approval, which approval may not be unreasonably withheld. This provision is not intended to preclude historical livestock management and livestock stocking practices.

10. Broadcast application of herbicides, pesticides, and biocides, shall be prohibited.

Grantor and Grantee acknowledge that certain acts or actions by Grantor with respect to the property subject to this conservation easement may not be undertaken until approved by Grantee. Those acts and actions requiring advance approval are expressly noted. Prior to the commencement or undertaking of any such activity, Grantor, or its successors or assigns, shall send to the Grantee notice of the intention to commence or undertake such activity. Such notice shall inform the Grantee of all aspects of such proposed activity. The written notice shall be directed to the Director, Department of Fish, Wildlife and Parks, Fish and Game Building, Helena, Montana 59601. The Grantee shall have thirty (30) days from receipt of the notice to review the proposed activity and to notify Grantor of its objections thereto. Such objections, if any, must be based upon Grantee's opinion that the proposed activity is either incompatible with the express terms of the conservation easement or the terms of any agreement, then in effect, regarding the management of recreation on the Blackfoot River, or regulations adopted by the Grantee to implement any such agreement. If in the opinion of the Grantee, it is possible that the proposed activity can

be modified to be consistent with the aforementioned criteria, the Grantee's response shall inform the Grantor of the manner in which the proposed activity can be modified. If there is concurrence with the manner set forth, and the response, the proposed activity may thereafter be conducted in the manner that is mutually acceptable to Grantor and Grantee. If the Grantee fails to respond within thirty (30) days after receipt of Grantor's notice, the proposed activity shall automatically be deemed consistent with the terms of the conservation easement.

Grantor shall be under no liability or obligation for any failure in the giving of any notice as required above with regard to any activity undertaken by Grantor necessitated by virtue of fire, flood, act of God, or other elements, hazardous conditions, or any other cause beyond the control of Grantor, similar to those hereinbefore specified.

Grantor further intends that should Grantor, its successors or assigns, undertake any activity requiring approval of the Grantee, without or in advance of securing such approval, or undertake any activity in violation of the terms of the conservation easement, the Grantee shall have the right to force the restoration of that portion of the Grantor's Land affected by such activity to the condition that existed prior to the undertaking of such unauthorized activity. In such case, the costs of such restoration and the Grantee's costs of suit, including attorney's fees, shall be borne by Grantor or its successors or assigns against whom a judgment is entered, or in the event that the Grantee secures redress without a completed judicial proceeding, by Grantor or its successors or assigns who are otherwise determined to be responsible for the unauthorized activity. Nothing herein contained shall be construed to preclude Grantor from exhausting its legal remedies in determining whether the proposed activity to which the Grantee has objected is inconsistent with the conservation easement.

If any provision of this deed of conservation easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of the deed of conservation easement and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

It is further provided that whenever said lands herein granted as a right of way and easement shall cease to be used for such purpose, and Grantee acknowledges affirmatively that such circumstance exists, the same shall revert to the state upon notice to that effect being given to the said Grantee named herein.

IN TESTIMONY WHEREOF, the State of Montana has caused these presents to be executed by the Governor, and to be attested by the Secretary of State, and countersigned by the Commissioner of State Lands, and the Great Seal of the State, and the Seal of the State Board of Land Commissioners to be hereunto affixed this ------SECOND---- day of ------NOVEMBER------- A.D., 1983--.

S/ TED SCHWINDEN

Governor of the State of Montana

ATTEST:

S/ JIM WALTERMIRE

Secretary of State

Countersigned by:

S/ DENNIS HEMMER

Commissioner of State Lands

SEAL OF STATE BOARD OF LAND COMMISSIONERS

GREAT SEAL OF MONTANA

DEED NO. D- 8944

# RIGHT OF WAY DEED

==========

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF MONTANA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

Know ye that the State of Montana, in consideration of the sum of Four Thousand Eight Hundred and No/100 Dollars ($4,800.00) now paid, grants to Custer Battlefield Preservation Committee, Inc., a Montana Corp. a right of way for a scenic easement upon and across state lands, as follows:

A tract or strip of land in the S½, Section 16, Township 3 South, Range 35 East, Principal Meridian Montana, Big Horn County, Montana.
The above-described right of way contains a total of 320.0 acres, more or less.

It is the purpose of this conservation easement to preserve and protect the natural ecological and aesthetic features of the subject properties and to foster the continuation of responsible livestock grazing in harmony with the ecological and aesthetic features of each property. Restrictions would generally conform to the following:

1) No subdivision of the property;
2) No structures permitted other than the minimum agricultural improvements, i.e., fencing, water troughs, etc., associated with continued grazing use;
3) No cutting, uprooting or removal of live trees or any other native vegetation, except that required for fire prevention, diseases, etc.;
4) No excavation or removal of top soil;
5) No removal of such quantities of water that would impair the maintenance of the existing vegetation and wildlife habitat;
6) No use of the property that will materially alter the landscape or topography, thereof;
7) No excavation of soils, or use of the property for storage, refuse purposes, or any other substances except those necessary to preserve the property in its present condition;
8) No use of the property as a campground, guest ranch, club, or for any other commercial purposes;
9) Nothing contained in this conservation easement shall be construed as affording uncontrolled public access to any portion of the property.

Permitted Uses:

1) The Grantors intent that the conservation easement shall allow use of the property similar to the existing situation which is that of livestock grazing;
2) Maintenance of agricultural facilities such as fences, water troughs, etc., is permitted provided it has minimum adverse impact on the subject properties;
3) Actions necessary for the prevention or control of fire on the property;
4) Maintenance of existing highway easements is permitted;
5) The State of Montana reserves to itself the right to prospect for and remove minerals on this parcel.
6) Grantee is by these presents granted the right, privilege, and option to transfer this easement by assignment to the National Park Service, United States Department of the Interior, for the use and benefit

of the public as a part of the National Park System of the United States of America.

It is evident that the subject conservation easement restricts futures uses of each property to agricultural pursuits similar to the existing use.

**It is further Provided that whenever said lands herein granted as a right of way shall cease to be used for such purpose, the same shall revert to the state upon notice to that effect being given to the said grantee named herein.**

**IN TESTIMONY WHEREOF, the State of Montana has caused these presents to be executed by the Governor, and to be attested by the Secretary of State, and countersigned by the Commissioner of State Lands, and the Great Seal of the State, and the Seal of the State Board of Land Commissioners to be hereunto affixed this 6th day of July, A.D. 1989.**

**Governor of the State of Montana**

**ATTEST:**

**Secretary of State**

**Countersigned by:**

**Commissioner of State Lands**

Right of Way Application No. 12873
MDOT Project STPP 46-5(4)51
Parcel 2-2W
Affecting a tract of land in N2NE4 and
NE4NW4, Sec. 36, Twp. 2N, Rge. 13W
Deer Lodge County, Montana

EASEMENT NO. D-11722

# RIGHT OF WAY DEED

**IN THE NAME AND BY THE AUTHORITY OF THE STATE OF MONTANA**

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

**Know ye that the State of Montana (hereinafter referred to as "Grantor"), in consideration of the sum of One Hundred Fifty-Six Thousand Six Hundred and No/100 Dollars ($156,600.00), now paid, grants to Montana Department of Transportation (hereinafter referred to as "Grantee") a right of way in perpetuity for the preservation, protection, restoration, construction, improvement, management and maintenance of a wetland upon and across State School Trust Lands, as follows:**

A tract of land in the N2NE4 and NE4NW4 of Section 36, Township 2 North, Range 13 West, P.M.M., Deer Lodge County, Montana, as shown by the shaded area on the plat, consisting of four (4) sheets attached hereto and made a part hereof, containing an area of 31.31 acres (12.617 ha) more or less.

**The grant of this easement is subject to the following conditions:**

The Grantee shall comply with the Montana Antiquities Act, Title 22, Chapter 3, MCA. In particular, Sections 22-3, Parts 4 and 8.

It is agreed that the Grantee shall comply with such rules or regulations as may be hereafter imposed by the State Board of Land Commissioners to insure that the environment will be adequately protected and the public health and safety not be endangered.

This easement is for the express purpose of providing the Grantee with a Wetland Preservation area for wetland credit acres. Subject to other terms and conditions contained herein, the term of the easement is in perpetuity.

The Grantee shall be responsible for controlling noxious weeds within the easement area. The Grantee is responsible on an annual basis for monitoring the wetland area for noxious weeds and making a good faith effort to control the noxious weeds prior to seed set. Grantee may contract with the County Weed Board, State Surface Lessee, or other party to control the noxious weeds but that in no way relieves them of the responsibility of making sure the weeds are controlled on an annual basis. The Grantee's methods of control must be reviewed by the Grantor's Area Field Office that has jurisdiction for that locale.

The Grantee shall comply with the Montana County Noxious Weed Management Act, Section 7-22-2101 MCA et. Seq., as follows:

The Grantee shall notify the local weed board that is responsible for that geographical area that the project is located in. If the Grantee disturbs vegetation for any reason, Grantee shall be required to revegetate the disturbed area. The Grantee shall submit to the local weed board a written plan specifying the methods to be used to accomplish revegetation. The plan must describe the time and method of seeding; fertilization, recommended plant species, use of weed-free seed, and the weed management procedures to be used. This plan is subject to approval by the local weed board, and therefore must be signed by the chairman of the board. Upon termination of this easement, Grantee shall reclaim the entire area in accordance with this paragraph.

The Grantee shall seed the wetland area to native grass species and must receive prior approval by the DNRC Anaconda Unit Office for the seed mixture.

Provided, that this right of way easement is granted under the express condition that the Grantee's exercise of the rights herein granted shall not interfere with the Grantor's use of the adjacent land.

The Grantee shall have secured all permits and approvals as may be required by law before beginning any construction within the easement area. These permits include, but are not limited to, any permit issued by the Army Corps of Engineers, the State of Montana Department of Environmental Quality, the County Flood Plain Manager, the local County Conservation District Board and/or the Montana Department of Fish, Wildlife and Parks. All terms, conditions, project specifications and time frames contained in all the permits, authorizations and construction specification plans become a part of the terms and conditions of this easement.

In the event the water source is such that a permit is required from the Department of Natural Resources and Conservation Water Resources Division prior to diverting, using or impounding any water for the wetland, then the Grantee must secure said water right permit from the Water Resources Division prior to any entry or initiation of any construction activity.

The Grantee will fence the easement area and gates will be kept closed until the wetland vegetational community becomes established and is considered stable by Montana Department of Transportation biologists and/or botanist. Fencing maintenance is the responsibility of the Grantee. The Grantee may contract with the State Surface Lessee or other party to perform fence maintenance but it is ultimately their responsibility to ensure the fence is maintained for whatever class of livestock is present. The Grantee may not remove the fence unless they receive written permission from the Grantor's Area Office. The Grantor may require the fence to remain in place and be maintained if removal would impact adjoining land use and/or conditions of this easement or adjoining leases could not be met with removal.

Provided, however, that, except for perimeter fencing, permission must be obtained in writing, from the Director, Department of Natural Resources and Conservation, prior to the construction of any improvements, structures, or other facilities on the right of way herein granted.

The Grantee shall monitor and maintain the easement area for the intended purpose of a wetland conservation easement. If the earthen embankment should breach or be damaged, or if the easement area needs erosion control measures, then the Grantee will respond to repairing these problems in a timely manner. If the Grantee should decide to vacate this easement then they would be required to reclaim the area to Grantor's Area Office specifications.

With prior written approval of the Grantor's Eastern Land Office, the Grantor hereby grants unto the Grantee the right of access, ingress to and egress from, this easement area over adjoining lands of

the State of Montana using existing roads and trails where practicable. In the event the Grantee finds it necessary to reconstruct any existing road or trail or to construct a temporary road into the easement area, they must contact the Grantor for approval prior to entering and/or beginning any construction activities. Where existing road access is not feasible, and where and when the DNRC Eastern Land Office approves such use, the Grantee may be allowed off-road access. The Grantor may impose additional stipulations and/or require additional compensation as a condition of any such approvals.

Provided, however, that the right of way granted herein is not exclusive and Grantee shall not interfere with the Grantor and its successors, assigns, lessees or other parties authorized to use State lands, in their right, at all times to go upon, cross and recross the land covered by said right of way and any road thereon, at any point, for any and all purposes in a manner that will not unreasonably interfere with the rights granted to the Grantee.

Provided, further, that the right of way deed granted herein shall be assignable by Grantee only with the written approval of the Director, Department of Natural Resources and Conservation.

In granting this easement, the Grantor agrees that the easement area shall not be used for any purpose contrary to the wetland that has been constructed or enhanced therein. Such wetland shall remain undisturbed and undrained, unless otherwise specified in this easement.

Provided however that the Grantor reserves to itself, its successors, and assigns all rights accruing from ownership of the land, including the right to engage in or permit others to engage in all uses of the Land that are not expressly prohibited or restricted by this Easement and that are not inconsistent with the purpose of the easement.

The Grantor will not graze livestock nor harvest hay upon said property for five years after the date of the grant of this easement and not thereafter unless it complies with periods established within a grazing/hay production management plan to be developed between the Grantor and Grantee. The plan will be established as the wetland develops within this easement area and will be implemented after five (5) years or upon approval of the U.S. Army Corps of Engineers that the site has met the mitigation objectives. The purpose of this plan is to provide long-term management of the wetland conservation easement and to manipulate the wetland and upland vegetational communities within the easement area for increased wildlife habitat diversity.

The Grantor relinquishes surface occupancy rights within the easement area for the removal of any minerals (including bentonite, soil, gravel, etc,) but retains all mineral rights and may explore and extract mineral resources (including oil, gas, etc.) from below the surface of the easement area <u>so long as such activities do not occupy the surface within the easement area. In addition, no by-product discharge and/or water will be allowed to enter the easement area.</u> However, the Grantee is hereby authorized to remove materials from within the easement area necessary to construct an earthen embankment within the above described easement area during the initial construction, and for all future maintenance needs, but it does not authorize the removal of sand, gravel or any other materials for any use outside of the boundaries of the above described easement area.

Grantor agrees that no trailer houses, mobile homes, or other portable living quarters shall be parked or located within the easement area for use as temporary or permanent living quarters.

Provided, however, that Grantor may terminate this right of way for a material breach of any of the conditions or provisions of this deed. Before Termination, the Board shall give Grantee written notice of intent to terminate and a reasonable period to cure the breach.

It is further provided that whenever said lands herein granted as a right of way shall cease to be used for such purpose, the right of

way shall terminate upon notice to that effect being given to the said Grantee named herein.

Provided, that Grantor may terminate this right of way for a material breach of any of the conditions or provisions of this deed. Before termination, the Board shall give Grantee written notice of intent to terminate and a reasonable period to cure the breach.

It is further provided that whenever said lands herein granted as a right of way shall cease to be used for such purpose, the right of way shall terminate upon notice to that effect being given to the said grantee named herein.

IN TESTIMONY WHEREOF, the State of Montana has caused these presents to be executed by the Governor, and to be attested by the Secretary of State, and countersigned by the Director, Department of Natural Resources and Conservation, and the Great Seal of the State, and the Seal of the State Board of Land Commissioners to be hereunto affixed this 22nd day of December, A.D. 2005.

.....
Governor of the State of Montana

ATTEST:

.....
Chief Deputy Secretary of State

Countersigned by:

.....
Director, Department of Natural Resources and Conservation

STATE BOARD OF LAND COMMISSIONERS STATE OF MONTANA

Accepted and Approved:

.....
Manager, Acquisition Section Applicant

.....
Betsy A. Tarrant
Printed Name

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES & CONSERVATION
LAND USE LICENSE - OTHER
LICENSE # 3053246

The STATE OF MONTANA, acting through the Department of Natural Resources and Conservation, hereinafter referred to as Licensor, hereby grants a LAND USE LICENSE to occupy and use lands administered by the Department of Natural Resources and Conservation, subject to all of the terms and conditions hereof, and under and pursuant to the terms and provisions of 77-1-204 MCA, as amended.

1. **LICENSEE**

   Montana Audubon, P.O. Box 595, Helena, MT 59624.

2. **DESCRIPTION**

   A tract or strip of land described as follows: NE4; E2NW4; W2SE4; SE4SW4; N2NW4NE4SW4; E2NE4SW4; S2S2SW4NE4SW4 and Lots 1 and 2, Section 16, T28N, R21W.

3. **DURATION**

   This license shall take effect upon signature of the Licensor and remain in full force and effect up to and including **February 28, 2010** unless canceled on account of sale or exchange of the land or for other good and sufficient reason prior to such date.

4. **RENTAL**

   Beginning upon acceptance of this license, and for the term of this license, the Licensee agrees to pay the Licensor an **annual rental of $642.00.**

   Payment must be made one year in advance, on or before March 1st of each year. The license fee will increase 2% annually throughout the term of the license.

5. **LICENSED ACTIVITY**

   The purpose of this Land Use License is for **Special Recreational Use activities including research and educational group use upon the land herein described as the Owen Sowerwine Natural Area. Furthermore, the Licensor agrees not to authorize activities inconsistent with the Master Plan for the Owen Sowerwine Natural Area for the term of this license agreement.**

6. **RESERVATIONS**

   The state reserves all rights and interests to the land under this license other than those specifically granted by this license. However, the Licensor agrees to refrain from conducting any activities inconsistent with the Master Plan for the term of this license.

7. **RIGHT TO ENTRY**

   Representatives of the State Historical Society of the State of Montana shall at all reasonable times, upon written notification to the Department of Natural Resources and Conservation prior to entry, have the right to enter into and upon the premises for the purpose of carrying out the duties assigned the Historical Society by the State Antiquities Act, 22.3.4 MCA.

8. **UNLAWFUL USE**

   If any part of the lands or premises under this license are used or allowed or permitted to be used by licensee for any purpose contrary to the laws of this State or the United States, such unlawful use shall at

The Licensee agrees to comply with all applicable laws and regulations in effect at the date of this license or which may, from time to time, be adopted, and which do not impair the obligations of this contract and which do not deprive the Licensee of an existing property right recognized by law.

10. **EXTENT**

All covenants and agreements herein set forth between the parties hereto shall extend to and bind their successors, assigns and legal representatives.

11. **FIRE PREVENTION AND SUPPRESSION**

As it pertains to the Special Recreational Uses authorized by this License, the Licensee assumes all responsibility for performing at his own cost and expense all fire prevention and suppression work necessary or required to protect the forage, trees, buildings, and structures on the land to the same extent as if the land was owned by the Licensee. This Licensee is not responsible for fire prevention or suppression that may result from general recreational use.

12. **ACCESS**

Representatives of the Licensor shall at all reasonable times have the right to enter into and upon the premises and all parts thereof for the purpose of managing the land and/or inspecting and examining uses thereof. Representatives of the Licensor shall also at all reasonable hours have free access to all books, records and papers of the Licensee insofar as they relate to the purpose for which this license is issued and the terms hereof.

13. **IMPROVEMENTS**

Except as provided for in the Master Plan, no improvements will be allowed on the land herein specified without written approval of the Licensor.

14. **LIABILITY**

The Licensee agrees to assume responsibility for fires that may result from use of the authority given herein to Licensee and shall hold, defend and save the Licensor harmless from all claims and lawsuits that may result from any and all damages, injury or death to persons and/or property that occur upon or about said land caused by or arising out of the Licensee's use of the subject area hereunder. Licensee shall indemnify Licensor and save, protect, defend, and hold Licensor harmless from any and all liability, loss, damage, expense (including legal expenses and reasonable attorney fees), causes of action, suits, claims or judgements arising from or based upon Licensor's ownership of the property, which is the subject of this license, from any cause or causes whatsoever as a result of Licensee or its agents being in or upon said premises or any part thereof during the terms of this agreement or occasioned by any occupancy by Licensee and all suits which may be brought against Licensor as a result of Licensee's occupancy, either alone or in conjunction with others, upon any such liability or claims. Licensee shall satisfy, pay and discharge any and all judgements and liens that may be recovered against Licensor as a result of Licensee's occupancy either alone or in conjunction with others, upon any such liability or claims. Licensee shall satisfy, pay, and discharge any such judgements and liens that may be recovered against Licensor in any such actions provided, however, that Licensor shall have given Licensee written notice of any such claim or demand promptly after receiving notice thereof.

15. **LIMITATION OF AUTHORITY**

Other than for the purposes specifically described in this agreement, the Licensee agrees that it does not, and shall not claim at any time any interests or estate of any kind or extent whatsoever in the premise by virtue of this license or their occupancy or use hereunder.

16. **TERMINATION**

The Licensor reserves the right to terminate the permission hereby granted at any time by giving the Licensee no less than ten (10) days written notice of such termination [illegible]

terminate the permission forthwith at any time, if Licensee fails to comply with, or abide by, each and all of the provisions hereof, or ceases to use the permission hereby granted. The Licensee agrees to peaceably yield possession of these premises upon termination of this license or for any cause. Consistent with the Licensee's obligations specified in #17 Reclamation Of The Land, the Licensee may terminate this license upon ten days written notice to the Licensor.

**17. RECLAMATION OF THE LAND**

The Licensee will take all reasonable precautions to prevent or minimize damage by Licensee to natural (i.e., vegetation, soil, water, wildlife) and cultural resources as well as manmade improvements within the lands specified in this agreement. Upon termination of this license by either party to this agreement, or upon final expiration of agreement, the Licensee shall reclaim the area damaged by the Licensee to the specifications of the Licensor. Reclamation must be consistent with the Master Plan.

**18. REMOVAL OF TIMBER**

The Licensee shall not cut, remove, use or destroy any timber or standing trees upon the land under this license and shall not allow or permit any other person to cut, use, remove or destroy any such timber or standing trees, unless such person is authorized in writing by the Licensor to do so. The Master Plan identifies the range of permissible timber removal consistent with the purpose of this license.

**19. WEATHER CONDITIONS**

The Licensor reserves the right to restrict or preclude any surface activity during periods of adverse weather and other conditions which may attribute to accelerated erosion, fire hazard, disruption of seasonal wildlife, or any other condition which in the opinion of the Licensor may have an adverse effect on State Land.

**20. NOXIOUS WEEDS**

The Licensee shall be responsible for controlling any noxious weed introduced by Licensee's activity on state owned land. The Licensee's methods of control must be reviewed by the Department of Natural Resources and Conservation's area field office that has jurisdiction for the locale. The Licensee shall comply with the Montana County Noxious Weed Management Act, Section 7-22-2101 et.seq., as follows: The Licensee shall notify the local weed board that is responsible for that geographical area in which the project is located. If the Licensee disturbs vegetation for any reason, Licensee shall be required to revegetate the disturbed area. The Licensee shall submit to the local weed board a written plan specifying the methods to be used to accomplish revegetation. The plan must describe the time and method of seeding, fertilization, recommended plant species, use of weed-free seed, and the weed management procedures to be used. This plan is subject to approval by the local weed board, and therefore must be signed by the chairman of the board. Failure to abide by these provisions may result in the cancellation of the license.

**21. ASSIGNMENT OF LICENSE**

If all rentals due have been paid and the terms of the license have not been violated, the license may be assigned on blanks provided for that purpose by the Director, but no assignment shall be binding on the Licensor unless the assignment is filed with the Director, approved by him, and the appropriate assignment fee submitted for such an assignment. Until an assignment becomes effective, the Licensor will consider the Licensee listed above to be the Licensee for all purposes. There may be no consideration given for the assignment other than the value of improvements, if any.

## 22. SPECIAL STIPULATIONS

The Licensee and Licensor will comply with the Owen Sowerwine Natural Area Master Plan, the terms of which are specifically made a part of the terms of this license. The Department of Natural Resources & Conservation will review the Master Plan with Montana Audubon and will adopt a revised plan by December 31, 2001. Failure to complete revision of the Master Plan by December 31, 2001 terminates this License.

A. The Licensor agrees to not lease or license any other activity on the subject lands without the written consent of the Licensee.

B. The right to conduct educational and research activities that do not require vegetative or hydrologic manipulation is granted. This right includes but is not limited to biological monitoring and research, natural / cultural history workshops and field trips, school field trips, and other interpretive activities conducted by the Licensee.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS STATE LAND USE LICENSE THIS 24 DAY OF April 20 01.

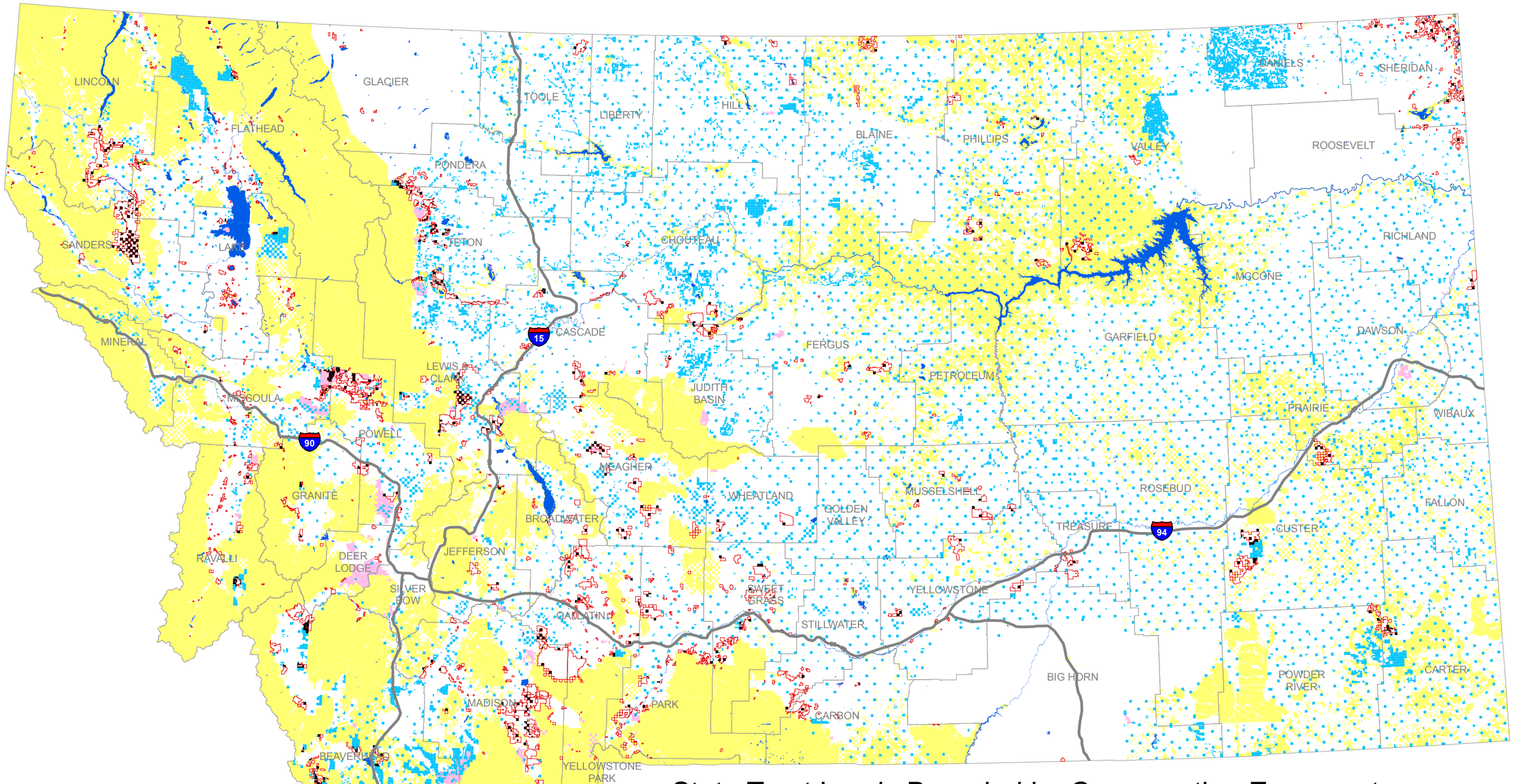
LICENSOR

ARTHUR R. CLINCH, Director
Department of Natural Resources & Conservation

By: Jon A. Dahlberg
Jon A. Dahlberg, Area Manager
Northwestern Land Office

LICENSEE

Raymond W. Johnson
Raymond W. Johnson
Montana Audubon




# State Trust Lands Bounded by Conservation Easements

**Legend**

- Interstate Highways
- Water
- Conservation Easements
- County
- State of Montana - Non Trust Lands
- Montana State Trust Lands
- Montana State Trust Lands - Bounded by Easement
- Federal Ownership

0 25 50 100 150 200 Miles

N W E S

Montana DNRC
Technical Services Section
5 March 2008

## Kolman, Joe

**From:** Dave Galt [dave@montanapetroleum.org]
**Sent:** Monday, June 30, 2008 4:11 PM
**To:** Kolman, Joe
**Subject:** HJ57 Comment

Mr. Kolman:

The Montana Petroleum Association offers the following comment regarding the HJ 57 Study Document on Conservation Easements on State Land.

It is my understanding that oil and gas development is allowed on land covered with conservation easements. Language I have seen in conservation easements from both MFWP and private conservation organizations allow oil/gas development with stipulations. After a review of the draft study document MPA is concerned by the absence of a discussion on oil and gas development on conservation easements on State Lands. MPA suggests that the study document contain some mention of the ability to develop oil and gas; perhaps under the findings section. Furthermore, any stipulations that are included in such easements should be reasonable and practicable.

Joe, thanks for the opportunity to comment.

Best Regards:
Dave

David A. Galt, Executive Director
Montana Petroleum Association
Box 1186
Helena, MT 59602

Musselshell Planning Group
PO Box 736
Harlowton, MT 59036

Comments on EQC Draft Conservation Easement Study per HJ57.

This planning group is a cooperative effort of five counties in the Musselshell River drainage, including Meagher, Wheatland, Golden Valley, Musselshell and Petroleum counties.

1. Comments on Findings and Recommendations sections, by study task.

   A. Analyze how or if conservation easements can ensure that multiple use management occurs.

   This study task is unanswered by the draft report. The findings indicate that the land board shall manage state lands that are utilized in a combination of ways with latitude for periodic adjustments. No discussion or finding about conservation easement providing for periodic adjustments is referenced or included. No discussion or finding about conservation easements providing for utilization ensuring judicious use of some or all resources is included or referenced. The finding regarding that mineral rights be held in reserve does not address the question if conservation easements ensure utilization of mineral rights if desired. Similarly no discussion of the opportunity to utilize and manage the mineral resources should be included. This should include sand and gravel. A similar analysis of agricultural and silvacultural opportunities, utilization and management should be included. The discussion about recreation does not specifically discuss recreational opportunities and management with a conservation easement.

   The opportunity to utilize and manage is important since the dictionary definition of "ensure" is to guarantee. The attached exhibit is an example of these concerns, and a discussion and findings should be included that addresses recreation, agriculture, silvaculture, habitat, energy, and open space.

B. Determine options and alternatives for providing the continuance of recreational uses in place prior to an easement being granted.

This study task is unanswered in that no options or alternatives are discussed or disclosed in the report. The finding on multiple use quotes the present law and includes a temporal component in mentioning periodic adjustments. This issue is not discussed in the findings and no specific options or alternatives are mentioned to continue existing recreational uses or new recreational uses are mentioned. We believe these should be discussed and disclosed in the report.

C. Evaluate opportunities for DNRC to partner with other organizations to acquire state trust lands ETC.

The findings do not address the study task concern or "perpetuating traditional uses of the lands". This may be an issue if per the third finding the specific purposes designated by the person gifting are only conservation and not ht e opportunity for multiple use. An in depth discussion of this issue and opportunities for multiple use should be included in each study task.

D. Can beneficiaries sue regarding conservation easements? The conclusion of yes we believe to be accurate. The conclusion that success is unlikely seems inconsistent in that the "large discretionary power" is subject to the multiple use requirement and if multiple use is not accomplished or ensured as a result of an easement, a suit may be successful for violating that requirement. This requirement is discussed on page seven of the draft

2. Comments relevant to all study tasks.

A. BMP's are good tools to ensure multiple use with minimal or nil environmental consequences. No discussion of BMP's or their inclusion in easements is included, and we believe it should be.

B. The introduction, page one, paragraph four, states that conservation easements are an effective tool available to protect these traditional uses. This conclusion is not substantiated in the study task or findings text. Importantly, a multiple use mandate ensures opportunities to use multiple

resources. No discussion of conservation easements ensuring the opportunity for use is included in the findings. Please reference the attached comments.

C. We are concerned with the "blank check" finding, which is that an easement is an agreement between parties that may include any provisions mutually agreeable. Multiple use and the Land Boards management is mandated by MCA 77-1-203, and as the finding on page three says "the Land Board shall" manage in certain ways. A discussion of language of terms that may be mutually agreeable to accomplish this should be included.

D. A discussion of conservation easements use as a tool in implementing other state strategies like the MDFWP Fish and Wildlife Conservation strategy should be included in this draft report. If consideration has not been given to this role, we believe it should be. This discussion should be included in the report.

The planning group will address the EQC or the Land Board regarding these concerns if that would be helpful. It would be helpful to understand how a conservation easement protects traditional uses. An explanation of what traditional uses need protection from would also be helpful. Our understanding of the importance of opportunity is made clear in the attached exhibit and it would be helpful to include this discussion in the introduction and in the findings.

Very truly yours,

Musselshell Planning Group

# Wheatland County

PO Box 1903
Harlowton, Montana 59036-1903

Phone (406) 632-4991
FAX (406) 632-4880

COMMISSIONERS:
Tom Bennett
David Miller
Richard Moe

MARY E. MILLER, Clerk and Recorder


December 14, 2007

Montana Land Reliance
324 Fuller Ave.
Helena, Mt. 59601

Dear Lois and Rock and Staff;

Wheatland County has reviewed the draft easement for Taber Ranch. This is a very good project and acknowledges some very important conservation and resource values in this county. By way of comment, we would request you consider seven additional things be addressed in the documents.

First, a sentence providing that agricultural opportunities will be available on this premises would facilitate preserving local agriculture. A sentence could read as follows: If the landowner ceases agricultural production at these premises, the landowner will make the ability to graze and cultivate the land will be made available at market price for agriculture to other producers. The first page statement about a working agricultural operation is very relevant to this.

Second, a sentence providing that silvacultural and agricultural practices on the premises will be conducted utilizing state or federal BMP'S (best management practices) would facilitate good management practices as management or ownership changes. A sentence could read as follows: the landowner will implement recognized BMP's in their silvacultural and agricultural operation, as a guideline for appropriate conservation and environmentally sustainable practices. Given that viewing a working agricultural operation is important, BMP's implemental would help increase a positive experience.

Third, a sentence providing that the landowner will cooperate with state and federal agencies in the management of big game would be helpful, as wildlife management is an important tool for State and Federal agencies. A sentence could read as follows: The landowner will cooperate with and facilitate State and Federal agencies activities to manage wildlife, including big game, on the subject and surrounding premises. An example of this would be in the Rostad easement in Wheatland County, which provides limited public access with limited days and limited numbers of people to facilitate appropriate control of elk populations. In addition some species are not big game. This is notably animals reintroduced, such as wolves. Cooperation with State and Federal agencies in the management of non-big game wildlife is important as significant wildlife and conservation impacts occur from reintroduction or similar programs.

Fourth, a sentence providing that the landowner will provide Wheatland County with comment and information relating to development or growth on properties in the vicinity would help the county minimize adverse impacts on the subject premises if development is proposed or occurs on surrounding lands. The County is in the process of rewriting it's growth policy and subdivision regulations, and will incorporate language in those to consider and mitigate impacts on lands like Taber Ranch that will occur if surrounding properties are developed. A sentence could read as follows: The landowner will provide comments to and information to Wheatland County in the event development or properties surrounding Taber Ranch, is proposed and is reviewed by the County, for subdivision, development, conservation easement, or other purposes.

Language identifying the riparian area importance and it's preservation value might be helpful. The biologic values of that we think are significant.

Lastly, page 1 should also reflect the importance of traditional and nontraditional agricultural opportunities. This is important relevant to our first comment on agricultural opportunities.

Thank you very much for the opportunity to comment. It is our hope that these suggestions are acceptable in some form, and will facilitate the county helping the Land Reliance and the Land Owner is accomplishing the objectives and preservation activities set forth in the conservation easement.

Very truly yours,

Tim Bennett David Miller

Richard Moe

Wheatland County Commissioners



JUL-01-2008 05:26 AM

# DRAFT

October 10, 2007 TABER CE

## DEED OF CONSERVATION EASEMENT

THIS GRANT DEED OF CONSERVATION EASEMENT ("Easement") is made this _____ day of _____, 20_____, by Taber Ranch, LLC, a Montana limited liability company, of P.O. Box 61, Shawmut, Montana 59078-0061, (hereinafter together with its successors and assigns collectively referred to as "Grantor") and THE MONTANA LAND RELIANCE, a nonprofit Montana corporation with a principal office at 324 Fuller Avenue, Helena, Montana 59601 (hereinafter referred to as "Grantee");

## RECITALS:

1. Grantor is the owner of certain real property in Wheatland County, Montana, more particularly described in Exhibit A attached hereto and incorporated by this reference (hereinafter the "Property"); and,

2. The Property has significant open space values as recognized in the Montana Open Space Land and Voluntary Conservation Easement Act, Montana Code Annotated (MCA) Section 76-6-101, et seq.; and,

3. The Property constitutes a valuable element of the Musselshell Valley and its scenic and open space lands which are of great importance to Grantor and to the people of Wheatland County, the State of Montana, and the United State of America, and are worthy of preservation and that provide opportunities to continue traditional agricultural practices; and,

4. The Property provides significant benefit to the people of the State of Montana, Wheatland County, and the United States by preserving and providing the following important resources:

a. Open-space lands which maintain the rural, agricultural and natural scenic qualities of the area and provide opportunities to continue traditional farming and ranching practices in perpetuity; and,

b. Scenic views of an historic Montana working agricultural landscape in the Musselshell Valley that is enjoyed by members of the general public traveling on State Highway 12 that borders the Property; and

c. Retention of significant scenic open space for a variety of other uses, including wildlife habitat and recreation;

(hereinafter collectively referred to as the "Conservation Values"); and,

5. Grantor, as the owner of the Property, owns the rights to identify, preserve, and protect in perpetuity the open space character, scenic values, and significant relatively natural features and other Conservation Values of the Property; and,

# MONTANA ASSOCIATION OF LAND TRUSTS

**Box 675 Whitehall, Montana 59759**
**Glenn Marx, Executive Director 490-1659**
**Email: malt@jeffersonvalley.net**
**Website: montanalandtrusts.org**



**Bitter Root Land Trust, Hamilton 406-375-0956**

**The Clark Fork-Pend Oreille Conservancy Sand Point, ID 208-263-9471**

**The Conservation Fund, Missoula 541-8555**

**Five Valleys Land Trust, Missoula 549-0755**

**Flathead Land Trust, Kalispell 752-8293**

**Gallatin Valley Land Trust, Bozeman 587-8404**

**Montana Land Reliance, Helena 443-7027**

**The Nature Conservancy, Helena 443-0303**

**Prickly Pear Land Trust, Helena 442-0490**

**Rocky Mountain Elk Foundation, Missoula 523-4533**

**The Trust for Public Land, Bozeman 522-7450**

**Vital Ground Foundation, Missoula 549-8650**


June 30, 2008

Senator Dave Wanzenried
Presiding Officer
Montana Environmental Quality Council
Box 201704
Helena, MT 59620-1704

Dear Senator Wanzenried:

Thank you for the opportunity to comment on the draft report relative to the Environmental Quality Council study on House Joint Resolution 57, conservation easements on state lands.

The Montana Association of Land Trusts would like to first compliment the EQC membership and staff for their work on HJR 57, and for the detailed and thorough presentation of the issue reflected in the draft report analysis submitted for comment.

Knowing the EQC membership's fondness for brevity, the comments from the Montana Association of Land Trusts will be brief and touch upon a few key elements of the report and the issue.

First, it has always been – and continues to be – the position of Montana land trusts that conservation easements on state lands would complement, rather than replace, existing or traditional uses of state lands. Conservation easements on private lands, which feature a wide variety of agricultural and forest management activities, testify to the commitment land trusts have in honoring and retaining traditional farmlands, ranchlands and working forests.

Second, in testimony to the EQC and to the Legislature, land trusts have emphasized that conservation purposes on state lands have the potential to increase revenue to the state school trust fund.

Third, land trusts believe, as evidenced in legislative testimony and presentations to the EQC, that the concept of conservation easements on state lands will largely be a locally-driven concept, with individual municipalities, counties or locally-led coalitions seeking solutions on definable state land parcels for local planning or future community needs. Land trusts believe it is imperative that the Montana Department of Natural Resources and Conservation have the authority and the policy flexibility to address these types of locally-driven initiatives. An unofficial question for the ECQ HJR 57 study is, Does DNRC have existing authority and the policy flexibility to address these types of locally-driven initiatives?

From the critical standpoint of state DNRC flexibility and authority, the information on page 31 of the draft report appears to provide an affirmative response. The eight points under the heading "Some Concluding Thoughts on Existing Legal Authority" provide a sound legal basis for DNRC to employ a wide variety of "tools" as provided in the eight examples.

Taken individually, the examples provide specific guidance and precise options to DNRC and the Montana Board of Land Commissioners, and taken collectively the range of policy options available through the examples would appear to allow DNRC and the Montana Board of Land Commissioners to address a wide variety of state land management conservation issues when and how they may arise. The brunt of the entire draft report suggests the DNRC and land board have substantial flexibility in managing trust lands, and page 31 of the report appears to define an already available array of "tools" for the state to employ. This should be construed as good news for the DNRC and for communities.

Directly under the eight policy/legal authority examples on page 31, Mary Sexton, Director of the Montana Department of Natural Resources and Conservation, indicates the department is not requesting "any additional authority regarding conservation easements and similar dispositions of state trust land property interests at this time."

Montana's land trusts would echo that sentiment, and agree that at this time no additional statutory authority regarding conservation easements on state lands is warranted.

It may be more prudent for the EQC, the Land Board, the Montana Legislature and communities to explore the range of policy/legal authority options listed on page 31 of the draft report and see where the exploration may lead them. That exploration may – or may not – result in identification of needed new or expanded authority for DNRC and the Land Board. If so, those questions or issues could be addressed at some future time.

Again, thank you for the opportunity to comment on the draft report, and again, land trusts offer compliments to the EQC membership and staff and also offer support for the draft report.

Sincerely,

Glenn Marx
Executive Director
Montana Association of Land Trusts