

**Montana Department
of
Fish, Wildlife & Parks**



P.O. Box 200701
Helena, MT 59620-0701
(406) 444-2602

March 15, 1996

TO: Environmental Quality Council, Capitol Building, Room 106, PO Box 201704, Helena MT 59620-1704
Dept. of Health & Environmental Sciences, Director's Office, Cogswell Building, PO Box 200901, Helena MT 59620-0901
Dept. of Fish, Wildlife & Parks Commissioners
Director's Office
Parks Division
Fisheries Division
Wildlife Division
Land Section
Design & Construction Bureau
Legal Unit
Montana Historical Society, State Historic Preservation Office, PO Box 201202, Helena MT 59620-12102
Montana State Library, 1515 E 6th Ave., PO Box 2301800, Helena MT 59620-1800
Jim Jensen, Montana Environmental Information Center, PO Box 1184, Helena MT 59624
Janet Ellis, Montana Audubon Council, PO Box 595, Helena MT 59624
George Ochenski, PO Box 689, Helena MT 59624
Gallatin County Commissioners, Gallatin County Courthouse, Bozeman MT 59715
Jerry DiMarco, PO Box 1571, Bozeman MT 59771
Dale Newell, 212 8th Ave., Helena MT 59601
John Neuffer, % Dale Newell, Partner, 212 8th Ave., Helena MT 59601
Robert K. Baldwin, Goetz, Madden & Dunn, P.C., Attorneys at Law, 35 N Grand, Bozeman MT 59771-0428
Sonja Berg, 5670 Thorp Rd, Bozeman MT 59715
Terry Abelin, General Manager, Bridger Bowl, 15795 Bridger Canyon Rd., Bozeman MT 59715
Joel Shouse, PO Box 337, Bozeman MT 59771
Gallatin County Planning & Zoning Committee, Gallatin County Courthouse, Room #4, 311 W. Main St. Bozeman MT 59715
Bridger Canyon Fire Dept., 8081 Bridger Canyon Rd., Bozeman MT 59715
Michael Coil, 125 W. Mendenhall, Bozeman MT 59715
Bridger Bowl, Inc., Max Simmons, Pres., 15795 Bridger Canyon Rd., Bozeman MT 59715
Bridger Canyon Property Assoc., %Jean MacInnes, 16621 Bridger Canyon Rd., Bozeman MT 59715
Bridger Pines Property Owners Assoc., %Darryl Razzano, 191 Wedelen Dr., Bozeman MT 59715
Tom & Carol Peterson, PO Box 127, Wilsall, MT 59086
Jerry Wing, 360 Ranch Corp., 3020 White Sulphur Springs Rd., ST Helena, CA 94574
U.S. Forest Service, Dave Carey, 3710 Fallon, Box C, Bozeman MT 59715
Montana State Park Foundation, %Wayne Hirst, PO Box 728, Libby MT 59923
Montana Wildlife Federation, PO Box 1175, Helena MT 59624-1175

Ladies and Gentlemen:

You recently received documents relating to the Montana Fish, Wildlife and Parks (FWP) proposal to exchange 120 acres of surplus and with Bridger Bowl, Inc. for lands more suitable to the mission of the department.

Gallatin

March 15, 1996

Page Two

There was one change made to the draft documents you received after the public review period and it is described in the Decision Notice. Please consider your draft documents with this one change as the final version.

A limited number of comments were received regarding the proposal. The comments are summarized in the enclosed Decision Notice. The comments indicate strong public support for this proposal. It is my recommendation to propose that the FWP Commission approve this proposal. This will be a preliminary approval only, as the Commission will need to approve the acquisition of exchange property at a later date. The State Land Board must also approve the acquisition of properties by the department.

The FWP Commission will be asked to approve the proposed disposal of the Bridger Bowl property in an exchange with Bridger Bowl, Inc. at their regularly scheduled meeting on March 28-29, 1996.

If you have further questions regarding this proposal, please contact me at (406) 444-3186.

Thank you very much for your interest and involvement.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert R. Martinka".

Robert R. Martinka
Chief of Field Operations

DECISION NOTICE
BRIDGER BOWL SURPLUS LAND DISPOSAL
Prepared by Montana Department of Fish, Wildlife and Parks
March 15, 1996

PROPOSAL

The proposed action is for Montana Fish, Wildlife and Parks (FWP) to dispose of 120 acres of land considered surplus to the department mission. This land was initially purchased in 1950 by the Montana Parks Commission and has become an integral part of the Bridger Bowl ski area. The land has been considered surplus to department needs since 1967 and Bridger Bowl Inc. has held a land use permit on this land since 1967. The subject lands contain ski runs and portions of the ski lift system.

The department proposes to exchange the fair market value of the surplus land of \$480,000 as determined by appraisal with Bridger Bowl Inc. for land more suitable to the mission of the department. The exchange property has not yet been identified. When it is, the FWP Commission and State Land Board must approve the acquisition of this exchange property in a separate process. Bridger Bowl Inc. would not receive title to the land until the exchange property is identified and the public processes are completed.

MONTANA ENVIRONMENTAL POLICY ACT PROCESS

FWP is required to assess impacts to the human and physical environment. The effects of the proposed disposal of surplus land were documented in an Environmental Assessment.

There was an initial public comment period from January 8 through January 29, 1996 and the period was extended to February 12 to accommodate the wishes of one of the adjoining landowners. Public notices of the proposed action were run in the Helena and Bozeman newspapers and a public hearing was held on January 22 at the regional FWP office in Bozeman. Approximately 50 copies of the EA were mailed out or delivered to adjacent landowners and interested parties. In addition, FWP representatives met with one adjoining landowner and representatives of Bridger Bowl Inc. on January 30, 1996 to explain the proposal.

The only change from the Draft Environmental Assessment was to extend the period for the department and Bridger Bowl to complete the proposed land exchange through the period of the current land use permit.

SUMMARY OF PUBLIC COMMENTS

We received a total of 15 comments including 8 written, one telephone comment and six verbal comments during the public hearing. One of the comments was received after the close of the public comment period for the EA. A summary of the comments follow.

Written Comments

Seven of the written comments and the telephone comment were supportive of the proposal. Several of these comments expressed concern about the subject lands continuing as part of the ski area and supported the proposal that would result in Bridger Bowl Inc. owning the land. One of the comments suggested extending the period for the department and Bridger Bowl to complete the land exchange through 1998 and another suggested that the department sell the property to the highest bidder. The supportive comments included comments from the Gallatin County Commission, Gallatin County Planning Office, adjoining landowners, Bridger Canyon Property Assn., Eagle Mount, Rep. Emily Swanson and the U.S. Forest Service District Ranger.

One of the comments, from the legal representative of an adjoining land ownership, opposed the proposal.

Response to Written Comments

1. Comment: "Why doesn't the department sell the property at public auction?"

FWP Response: The department is committed to the property remaining a part of the Bridger Bowl Ski area. The property has been utilized by the ski area since its inception and the department believes that it is in the best interest of the public that the property remain as part of the Bridger Bowl Ski area. If the property were to be sold to the highest bidder, Bridger Bowl might not be the successful bidder.

2. Comment: " I feel extending the time to 1998 would help your organization find and obtain appropriate lands".

FWP Response: The FWP Commission has expressed the same concern and the department agrees with the recommendation. The final Environmental Assessment reflects the change.

3. Comment: The comment that opposes the land disposal proposal questions the legal basis for the proposal.

FWP Response: The response to these comments are included in an addendum to this decision notice.

Public Hearing

A public hearing was held at the regional office of the Department of Fish, Wildlife and Parks in Bozeman on January 22, 1996. A total of 9 people attended the hearing and six provided testimony. All of the testimony favored the proposal.

DECISION

Based on the Environmental Assessment and the public comment there

is a great deal of support for disposing of the surplus land by exchanging its fair market value with Bridger Bowl Inc. for other lands more suitable to the mission of the department. It is clearly in the public interest for these lands to continue as part of the Bridger Bowl ski area. It is my recommendation that the Fish, Wildlife and Parks Commission approve the exchange of 120 acres of surplus land for interest in other lands suitable for department programs and purposes.

A handwritten signature in cursive script, appearing to read "Robert A. Martinka", is written over a horizontal line.

Robert A. Martinka
Chief of Field Operations

**Montana Department
of
Fish, Wildlife & Parks**



MEMORANDUM

March 15, 1996

TO: Bob Martinka
FROM: Curt Larsen *Curt Larsen*
SUBJECT: Bridger Land Exchange

Two individuals who own land adjacent to the subject land have raised several objections to the proposed exchange. Among other things, these individuals assert that the proposed transaction is unconstitutional and illegal and cannot be approved. They assert that the proposed transaction is not truly an exchange, but a sale. If a sale is involved, the land must be offered to the public and the department must solicit bids for the property. Further, they assert that even if the transaction was an exchange, the exchange would be illegal because the value of the subject property was measured in terms of money. These commentors also assert that the department must comply with the provisions of Title 77 of the Montana Code, which generally governs the management of state trust lands. Among other things, this would require approval of the State Land Board. Further, these commentors assert that the department is not obtaining fair market value for the subject land.

In general, the objections of these commentors are incorrect. The commission and the department do have the authority to proceed with the proposed exchange transaction with Bridger Bowl. The transaction is an exchange. The State Land Board will also need to approve the final exchange package, since the department will be acquiring property in the process. Further, the valuation of the property is fair and appropriate.

A brief review of the proposed transaction and the legal authority for it are necessary to put the objections and this response in proper perspective.

Exchanges in general have been an integral part of the department's land management objectives and practices. The department maintains a data base that includes information about exchange transactions by the department. This data base shows the department has entered into several dozen exchanges in recent years.

Recent examples of exchanges that mutually served the interests of

by the state. This will show Bridger's good faith and ability to perform its end of the transaction. Bridger will not then obtain title to the state's property at Bridger, as the commentators may have thought. The state will execute a deed to be placed in escrow with the escrowed funds. If and when exchange property is identified, there will be further public review processes, and commission and State Land Board approvals before the project is completed. Then deeds to the exchange property will also be placed in escrow, and the department will then take title to this exchange property. The escrowed deed to Bridger will be released from escrow at that time and delivered to Bridger. If exchange property cannot be acquired within the time frame designated by the commission, Bridger will not receive the escrowed deed to the department's land, and the exchange will not be completed.

If the commission approves this transaction with Bridger, this will permit the department to proceed with identifying exchange lands that meet the department's program objectives, and begin negotiations with those landowners. As stated above, once the exchange land is identified, further approvals for this transaction will then need to be obtained from the FWP Commission and the State Land Board, as required by §87-1-209, MCA.

The department could require Bridger to first obtain title to the land the department wishes to acquire in the exchange, and then transfer it to the department, but that would be elevating form over substance; and would unnecessarily complicate the transaction and make it more costly. Additional closing fees, recording fees and title insurance premiums would be incurred. Further, there would be timing problems, and other contractual commitment issues for Bridger and the department to deal with if there was no initial commitment between the state and Bridger to complete an exchange. In other words, Bridger may have to enter into contracts for acquiring these other lands to be exchanged with the department, without a firm commitment from the state that it would complete the exchange.

The department has also entered into several tax-free land exchanges with landowners, also known as "section 1031" exchanges. In these cases, the landowner from whom the department is acquiring a property interest has used the cash proceeds paid by the department to acquire other land, thereby avoiding a capital gains tax on the sale to the department. These are treated by the IRS as exchanges between the state and the landowner, but the IRS does not require the state to first buy the exchange property and then transfer it to the landowner. The landowner may acquire the exchange property directly from a third party or through an intermediary. In this way, the department avoids assuming any liability for the exchange property, such as warranty of title, or environmental warranties. The Mannix conservation easement is a recent example of this type of transaction. These liabilities are also of concern to Bridger in the present case. If Bridger was required to

simultaneously buy and transfer land to the department, and own the land for only an instant, it would be subject to these liabilities.

Exchanges of state land are expressly provided for in the state constitution. As noted by the commentators in their letter to the department, Art. X, §11 of the constitution provides in full as follows:

Public land trust, disposition. (1) All lands of the state 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.

(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. (emphasis added)

The transcripts from the Constitutional Convention at which this provision was adopted reveal that the delegates were primarily concerned about state-owned school trust lands in this section. Nevertheless, the language of the constitutional section is broad enough to cover all state-owned land.

With respect to exchanges, subsection 4 of Article X, §11 of the constitution imposes only two simple, but important requirements: That the state obtain value for value, and that the exchanged lands be, as closely as possible, equal in area. It is very difficult to exactly satisfy both considerations in the same transaction. Rarely do two distinct parcels of property have exactly the same value and the same area.

Certain constitutional provisions are self-executing. This means that they do not require implementing legislation. The test of whether a constitutional provision is self-executing was stated by the court in Plante v. Smathers, 372 So.2d 933, 937 (Fla. 1979) as follows:

[W]hether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

(citations omitted)

A similar statement about self-executing constitutional provisions was enunciated by the Montana Supreme Court in the somewhat dated case of State ex rel. Bennett v. State Board of Examiners, 40 Mont. 59, 104 P. 1055 (1909). The highest court in New York has ruled that constitutional provisions should be presumed to be self-executing, unless they provide otherwise. People v. Carroll, 3 N.Y.2d 686, 148 N.E. 2d 875 (1958).

Subsection 4 is self-executing, i.e., it does not require implementing legislation, as does subsection 2, concerning sales of state land. Subsection 4 provides authority directly to state agencies to complete exchanges. Note that subsection 4 provides that "Any public land may be exchanged for other land, public or private"

The requirement of obtaining value for value in an exchange is stricter than the requirement for an ordinary sale of property. Under the Constitution, and §87-1-209, MCA, when the department sells property for cash, it must solicit bids from the public and may accept the highest bid. The department may not obtain full value for land in such a public bidding process. In an exchange, the department must receive fair market value for the property exchanged.

These commentators also assert that even if Bridger purchased a separate parcel valued at \$480,000 and traded it to the state, this would be a sale "because the value of the subject property was measured in terms of money." In support of this statement, the commentators discuss the differences between sales and exchanges, citing several state statutes and court cases from other states. This assertion is contrary to the constitutional mandate that the values of exchanged properties must be equal. Such a comparison of values necessarily requires that they be measured in terms of their monetary value. The citation of numerous cases by the objectors are of little relevance, as the State Constitution requires that the exchange properties be valued.

State statutes and court cases must be kept in context, and not applied to issues they were not intended to address. Section 30-11-

112, MCA, cited by these commentators, contains a definition of "exchange" as follows:

Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing nor both things being money only.

This statute does not require that only property be considered in an exchange of land, but that money cannot be the sole consideration in an exchange.

The commentators did not cite §30-11-113, MCA, in their comments, which provides as follows:

Sale equivalent to exchange. The provisions of the sections on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives and of a buyer as to what which he takes.

Thus, state law recognizes that sales and exchanges are similar transactions. The main difference is that an exchange includes property as a part of the consideration given for acquiring property, rather than money only. Sales and exchanges of state land are handled much differently under the Constitution, however, as discussed above.

A recent court case from Arizona relied on by these commentators must also be carefully examined. It does not support the commentators' statements that an exchange cannot be measured in terms of money. Rather, in that case, the court held that Arizona's constitution did not permit exchanges without public bidding, and determined that exchanges were really sales in any event. Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587, 790 P.2d 242 (1990). The court in this case noted that the Montana Constitution does allow for exchanges of state land for private land or other public land without public bidding.

The point is that the commission need not engage in an unduly technical analysis and inquiry of the differences between a true sale and a true exchange. As 30-11-113, MCA, and the Fain Land & Cattle case shows, the difference between the two is not always clear and exact. However, the State Constitution forbids the commission from making the type of distinction between sales and exchanges that these commentators have articulated. The values of property involved in an exchange must be measured.

The State Constitution provides the authority for the proposed transaction with Bridger Bowl. The commentators did not consider the constitutional authority given the state to conduct exchanges. The proposed transaction will comply with the legal requirements imposed by the Constitution for exchanges.

In addition to the constitutional authority for exchanges, the department has statutory authority for exchanges under §87-1-209, MCA. That section provides in part as follows:

Acquisition and sale of lands or waters. (1) The department, with the consent of the commission and, in the case of land acquisition involving more than 100 acres or \$100,000 in value, the approval of the board of land commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection. The department may develop, operate, and maintain acquired lands or waters:

(a) for fish hatcheries, nursery ponds, or game farms;

(b) as lands or water suitable for game, bird, fish, or fur-bearing animal restoration, propagation, or protection;

(c) for public hunting, fishing, or trapping areas;

(d) to capture, propagate, transport, buy, sell, or exchange any game, birds, fish, fish eggs, or fur-bearing animals needed for propagation or stocking purposes or to exercise control measures of undesirable species;

(e) for state parks and outdoor recreation;

(f) to extend and consolidate by exchange, lands or waters suitable for these purposes. (emphasis added)

The FWP Commission is charged by law with the duty and responsibility of approving land transactions by the department. The commission must determine whether the proposed transaction is in the public interest and should be approved.

The commentators have discussed at some length the legal requirements for exchanges found in Title 77 of the Montana Code. As indicated above, State Land Board approval will be required.

The provisions of Title 77 generally apply to school trust lands, and have not been applied to the lands of the department. The legal requirements applicable to land transactions by the department are found in the constitutional provisions cited above and in Title 87 of the Montana Code.

Other state agencies also have substantial land holdings, the biggest of which may be the Montana Department of Transportation (MDOT). As with FWP, the MDOT has its own statutory authority for acquisitions and dispositions of real property, found in Title 60, chapter 4 of the Montana Code. Section 60-4-201, MCA, addresses exchanges by MDOT. The constitution and this section provide complete authority to MDOT, and the provisions of Title 77 do not apply to MDOT land transactions. Similarly, the constitution and the provisions of Title 87 provide the rules governing FWP's land transactions.

The State Land Board has jurisdiction over this department's land transactions, as provided in §87-1-209, MCA. Under §87-1-209, the State Land Board must approve acquisitions by the department that are greater than 100 acres or \$100,000 in value. This measure of authority is provided in Title 87 (FWP statutes) and not in Title 77. The requirements of Title 77 do not apply to the proposed transaction with Bridger Bowl. Even if they did, the provisions of Title 77 would not prevent the proposed transaction. The department will seek approval from the State Land Board. Thus, compliance with Title 77 of the Montana Code is for the most part a moot point.

The commentators have cited 77-2-205, which provides that for school lands, no exchange for private land should be made that will induce or encourage large-scale development unless the value of such development is considered in determining value. Although we do not believe this section applies to FWP, the commission may wish to consider this statute in reaching its decision about the proposed exchange.

The commentators have also raised objections about the valuation of the Bridger property, asserting that it is worth much more than \$480,000. Their stated concern about the value of the property is inconsistent with their argument that the state cannot value the property in an exchange. Nevertheless, this concern should be addressed, since their comment about valuation of properties in an exchange is invalid. The State Constitution requires the department to receive value for value in an exchange.

The state purchased the subject property in 1950 for the sum of \$2,400.00. Since then, Bridger Bowl has developed a popular ski area that uses the state's land for ski runs and lifts. It is fair to assume that much of the value now inherent in the state land is due to Bridger's efforts in developing the ski area.

The property was appraised in 1992, by Ed Jackson, a certified appraiser in Bozeman. This was about the time discussions began with Bridger Bowl concerning disposition of the property. At that time, the full fair market value was adjudged to be \$300,000.00. Mr. Jackson also prepared the later appraisal. He estimated the value of the property as of April 3, 1995, to be \$480,000.00.

Mr. Jackson's appraisal was based on existing permitted and reasonably possible uses of the subject property. The department should accept his assumptions concerning the property as reasonable and appropriate under all the circumstances.

The commentators rely on anecdotal evidence of other land transactions or potential land transactions in the Bridger area to support their conclusions that the subject property is undervalued. This anecdotal evidence is insufficient to overcome the professional analysis performed by Mr. Jackson.

The commentators own 3.7 acres of land adjacent to the subject property, and state that Bridger offered \$15,000 an acre for this tract some years ago. They then extrapolate this number to the lower 40 acres of the state's property. For the upper 80 acres, Mr. Jackson's per acre value of \$4,000 for the entire tract is used by them, to arrive at a valuation of \$920,000 for the entire parcel [(\$15,000/acre X 40 acres)+(\$4,000/acre X 80 acres)]. This turns out to be \$7666.67 per acre. They also assert that Bridger could transfer development rights to this property, and develop an attractive commercial development on the lower 40 acres.

Anything is possible, given enough time, resources and capital. However, it is inappropriate to extrapolate an offer for a much smaller tract to the state's property. Much different market forces are brought to bear on a small, developed tract of property than on a large undeveloped tract. An appraisal must be based on reasonable assumptions, given all of the circumstances, including the size of the tract and the feasibility of uses. Potential development of the subject property must take into account required zoning changes and approval of development plans by local planning authorities. Potential development of the property must also take into account the separate value of transferrable development rights. Transferring development rights on to the subject property is not a free transaction in an economic sense. Such a transfer must also be a part of the approval process of the local planning authorities. Substantial capital would also be needed to construct the infrastructure needed for development. Even if the property is developable, this does not translate into a higher value for the property. The feasibility and cost of development must also be taken into account.

Development of the property is not a foregone conclusion by any means. The Bridger Canyon Property Owner's Association has been fighting the 360 Ranch development in the Bridger area for several years. This fight went to the Supreme Court, with the Court rendering a decision in March 1995 in favor of the property owners and against development. Bridger Canyon Property Owner's Assn. v Bridger Zoning Dist. 360 Ranch (1995). It should be noted that this same association supports the proposed exchange with Bridger Bowl.

In short, the valuation placed on the property by a professional appraiser appears to be fair and reasonable. An appraisal is not based on speculation. There are no exact appraisal standards in the law. Ultimately, it is up to the commission to decide whether \$480,000 is a fair value of the property.