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March 6, 2008

TO: EQC Members

FR: Todd Everts, EQC Legal Staff

RE: Legal Analysis Regarding State Land Board and DNRC Authority in Relation to HJR 57

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 purpose of this memorandum is to legally analyze those questions.

In an overt attempt to eliminate duplication of staff effort on this subject (although, unfortunately, some duplication is unavoidable), I want to re-refer Council Members to an excellent piece of staff research done by Joe Kolman that was presented to the EQC at its September 2007 meeting, entitled "*HJR 57: A Primer - Conservation Easements and State Trust Lands*". You can access this document at:

[http://leg.mt.gov/css/lepo/2007\\_2008/environmental\\_quality\\_council/staff\\_reports/reports.asp](http://leg.mt.gov/css/lepo/2007_2008/environmental_quality_council/staff_reports/reports.asp)

Mr. Kolman's primer provides an extensive overview of State Land Board and DNRC authority and actions taken regarding conservation easements and similar dispositions of property interests on state trust lands. In addition, our sage Chief Legal Counsel, Greg Petesch, has previously conducted a legal analysis that concluded that legislative authorization of conservation easements placed on state trust lands is legally valid (see attached legal opinion).

During the January EQC meeting, the Council specifically requested that I analyze the following questions:

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?**

**Short Answer:**

(1) 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 that are relevant to the HJR 57 Study. The 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. The Board has the existing authority to sell an estate or interest in state trust land (i.e., for less than fee simple). The Board has specific legal authority regarding the use of easements for conservation purposes or other public uses on state trust lands. The Board also has the authority to grant easements on state trust lands for natural areas under the Montana Natural Areas Act of 1974.

(2) DNRC Director Sexton has stated that DNRC is not requesting any additional authority regarding conservation easements and similar dispositions of state trust land property interests at this time.

**2. 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?**

**Short Answer:** Yes. However, the likelihood of success on the merits of such a lawsuit is likely limited.

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**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.<sup>1</sup> Upon admission, Congress granted Montana the sixteenth and thirty-sixth sections of each township within Montana "for the support of common schools."<sup>2</sup> 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 more than 5.1 million acres and the mineral acreage is in excess of 6.2 million acres.<sup>3</sup>

### *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.<sup>4</sup> 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 that 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 business man. 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.<sup>5</sup> 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

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<sup>1</sup>The Enabling Act, chapter 180, 25 Stat. 676 (1889)

<sup>2</sup>Id. at section 10

<sup>3</sup>DNRC Trust Land Management Division Fiscal Year 2007 Annual Report, page 1

<sup>4</sup>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)

<sup>5</sup>Wild West Motors, Inc. v. Lingle, 224 Mont. 76, 728 P.2d 412 (1986)

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.<sup>6</sup>

The Court has also determined that the Board and the DNRC must have large discretionary power in managing state trust lands,<sup>7</sup> but that discretionary power is not unlimited, and it must conform to the trust,<sup>8</sup> and that discretionary power must be consistent with the Constitution.<sup>9</sup>

### *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".<sup>10</sup> 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.

(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.<sup>11</sup>

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<sup>6</sup>Id.

<sup>7</sup>State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916)

<sup>8</sup>Toomey v. State Board of Land Commissioners, 106 Mont. 547, 81 P.2d 407 (1938)

<sup>9</sup>State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966)

<sup>10</sup>Article X, section 4, of the Montana Constitution

<sup>11</sup> Article X, section 11, of the Montana Constitution

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

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. .

The said lands may be leased under such regulations as the legislature may prescribe.

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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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. . .".<sup>15</sup> Under the direction of the Board, the DNRC is charged with the administration of state trust lands.<sup>16</sup> 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

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<sup>12</sup>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))

<sup>13</sup>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)

<sup>14</sup>State ex rel. Hughes v. State Board of Land Commissioners, 137 Mont. 510, 353 P.2d 331 (1960)

<sup>15</sup> 77-1-202, MCA

<sup>16</sup>77-1-301, MCA

provided in The Enabling Act".<sup>17</sup> 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.<sup>18</sup> 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".<sup>19</sup>

The Board is also required to manage state lands under the multiple-use management concept.<sup>20</sup> 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 impairment of the productivity of the land, with consideration being given to the relative values of the various resources.<sup>21</sup>

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.<sup>22</sup>

The Board also has general authority on behalf of the state to accept gifts, donations, grants, legacies, and devices.<sup>23</sup> 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.<sup>24</sup> The Board

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<sup>17</sup>Id.

<sup>18</sup>Id.

<sup>19</sup>Id.

<sup>20</sup>77-1-203, MCA

<sup>21</sup>Id.

<sup>22</sup>Ravalli County Fish & Game Association, Inc. v. Department of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995)

<sup>23</sup>77-1-213, MCA

<sup>24</sup>Id.

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.<sup>25</sup>

*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.<sup>26</sup>

The Board may sell state land subject to certain limitations and if it is in the best interests of the state.<sup>27</sup> State law includes restrictions on land available for sale, including land likely to contain valuable mineral deposits or certain state land bordering on navigable lakes, nonnavigable meandered lakes, and navigable streams.<sup>28</sup> The Board is also required, when selling any state land, to reserve certain mineral rights.<sup>29</sup>

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.<sup>30</sup>

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, but before I analyze the details of that authority, it would be helpful to highlight some of the subtle distinctions between what I would term "traditional" easements and conservation easements allowed under state law.

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<sup>25</sup>77-1-214, MCA

<sup>26</sup>77-1-204, MCA

<sup>27</sup>77-2-301, MCA

<sup>28</sup>77-2-303, MCA

<sup>29</sup>77-2-304, MCA

<sup>30</sup>77-2-201, MCA, through 77-2-217, MCA

### 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".<sup>31</sup> Stated another way, an easement is a grant of the use of and not a grant of title to land.<sup>32</sup> Under Montana law, an easement is considered to be a "burden" or "servitude" attached to land.<sup>33</sup> 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, or to using land adjacent to a firearms shooting range as a range safety zone.<sup>34</sup> The extent of the servitude is "determined by the terms of the grant or the nature of the enjoyment by which it was acquired".<sup>35</sup> 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".<sup>36</sup>

### Conservation Easements

Although the term "conservation easement" is not defined in the state land management statutes under Title 77, chapter 1, of the Montana Codes 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.<sup>37</sup>

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<sup>31</sup>Laden v. Atkeson, 112 Mont. 302, at 305, 116 P.2d 881 (1941)

<sup>32</sup>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)

<sup>33</sup>70-17-101, MCA

<sup>34</sup>70-17-101(4), (18), (20), MCA

<sup>35</sup>70-17-106, MCA

<sup>36</sup>City of Missoula v. Mix, 123 Mont. 365, at 370, 214 P.2d 212 (1950)

<sup>37</sup>76-6-104 (2), MCA

In addition, if a public body (state, counties, cities, towns, and other municipalities) acquires an interest in land under the provisions of the Conservation Easement Act that is less than fee, this acquisition is considered to be a conservation easement.<sup>38</sup>

Permissible conservation easements include easements or restrictions that may prohibit or limit 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, MCA;
- (8) other acts--other acts or uses detrimental to such retention of land or water areas in their existing conditions.<sup>39</sup>

A conservation easement may be granted either in perpetuity or for a term of years.<sup>40</sup> A property owner may sell or grant a conservation easement to a public body or to a private qualified organization.<sup>41</sup>

#### 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

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<sup>38</sup>76-6-201, MCA

<sup>39</sup>76-2-203, MCA

<sup>40</sup>76-6-202, MCA

<sup>41</sup>76-6-106 and 76-6-204, MCA

imposed as a burden on the land.<sup>42</sup> A 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".<sup>43</sup>

#### Easements on State Trust Lands

The Board has the statutory authority to grant certain types of easements on state lands for certain purposes.<sup>44</sup> The Board may grant easements for purposes such as schoolhouse sites and grounds, public parks, community buildings, cemeteries, conservation purposes, and other public uses.<sup>45</sup> Easements granted for "conservation purposes" under the provisions of 77-2-101, 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 may also grant easements on state land for right-of-ways and other uses defined as a public use in the eminent domain statutes.<sup>46</sup>

It is noteworthy that an easement for "conservation purposes" is not defined within the trust land administration statutes. I also want to highlight here as Mr. Kolman noted in his HJR 57 primer, that there are numerous examples of easements being granted on state trust lands that include conservation measures.

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<sup>42</sup>Id. at Missoula v. Mix, at #36.

<sup>43</sup> See attached legal memorandum to Senator Curtiss regarding the legality of conservation easements on school trust lands (March 29, 2007)

<sup>44</sup>77-2-101, MCA

<sup>45</sup>77-2-101 (1), MCA

<sup>46</sup>77-2-101(2), MCA

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.<sup>47</sup> 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.<sup>48</sup>

Under the Montana Natural Areas Act of 1974,<sup>49</sup> the Board may grant an easement or acquire property interests, including gifted conservation easements for the establishment of natural areas.<sup>50</sup> 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.<sup>51</sup>

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

When it is all 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 been 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.

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<sup>47</sup>77-2-318, MCA

<sup>48</sup>77-2-319, MCA

<sup>49</sup>76-12-101 through 76-12-123, MCA

<sup>50</sup>76-12-107 and 76-12-108, MCA

<sup>51</sup>76-12-104 (3), MCA

2. The Board has the authority to retain an estate or interest in state trust lands. This interest could include ( and has been 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, specifically include public bodies.

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

I had a chance to talk to DNRC Director Sexton, and she stated 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 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.<sup>52</sup>

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<sup>52</sup>Id. at #7.