

HJR 57: A Primer - Conservation easements and state trust lands

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for the

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Introduction

House Joint Resolution 57 passed by the 60th Legislature requires a study of granting conservation easements on state trust lands. (**Appendix A**).

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.

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.

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 Land Board, which consists of the governor, the attorney general, the secretary of state, the state auditor and the superintendent of public instruction. The Department of Natural Resources and Conservation is charged with the administration of trust lands.

In describing the management powers and duties of the Land Board, 77-1-202, MCA, says, 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 also may raise money through the sale of licenses that permit recreational use.

The multiple use management of trust lands is mandated by 77-1-203, MCA. It says 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, another may be a mineral right.

In the case of a conservation easement, the property owner gives up the right to some future use of the property. But 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 powers of a conservation easement 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, housetrailer, 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 a qualified private organization defined by 76-6-104, MCA, as a private, non-profit organization that aims to promote open space.

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

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

Conservation Easements/Public Land

Almost 99 percent 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 SB 159, giving the Land Board limited power to grant conservation easements on state lands. As amended, the measure passed the House 99-1 and the Senate 46-1.

² 2007 Performance Audit, Conservation Easements,
<http://leg.mt.gov/content/audit/download/06P-01.pdf>

³ibid.

The law, 77-2-101, MCA, allows conservation easements 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 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 mandate of DNRC to maximize revenue. **(Appendix C)**

To date, only the provision of 77-2-101 that allows a conservation easement 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 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 Sen. 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 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 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 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 391 by Sen. 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::

- * not allowed the conservation easements to exceed 50 years.
- * required the DNRC to reappraise the value every 10 years and adjust the payment.

- * not allowed qualified non-profits to hold a conservation easement.
- * reserved the mineral rights.
- * required the Land Board to provide compelling evidence that the easements would comply with the multiple use concept and allow traditional and recreational uses in place before the easement was granted.
- * limited the total acreage of state trust land placed under conservation easement to 25,000 acres.

The fiscal note estimated 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, Sen. 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, SB97, 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 impact similar to those listed in the 2007 bill. (**Appendix G**)

Other easements

Changes to state law in 2001 specifically referenced conservation easements. But 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, 70-30-102, MCA.

Besides the Blackfoot Clearwater conservation easement allowed by state law, 13 other easements on trust lands granted between 1963 through 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 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 said 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. But it prohibited new roads and residences. (**Appendix J**)

In 1989, two "scenic" easements were sold on two 320 acre parcels 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 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 five years and forbids 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**).

Fish, Wildlife and Parks also has entered into a five-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 Board's obligation to the trust and includes multiple use management.

In 2001, the 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 and also must have one or more of the following 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 percent annually through February 2010, when the license expires. (**Appendix M**)

The Owen Sowerwine Natural Area is one of the three parcels eligible for a conservation easement 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.