

Trust Land Easements - How Montana Compares

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Environmental Quality Council

January 15, 2008

Introduction

The work plan approved by the EQC for the HJ57 conservation easement study calls for an examination of laws in other states regarding conservation easements on state trust lands. Also covered here are sales of interests in trust lands. Some states allow interests to be sold or withheld from a sale, which could result in the same condition as a conservation easement granted in perpetuity.

This overview includes western states that have a significant amount of state trust land.

Summary

Common among states is the power to issue easements on trust lands. Some states, such as Utah, Colorado and Montana, specifically mention conservation easements. 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 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 for mineral exploration and development and 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Easements in Montana are granted in perpetuity or until the use for which the easement was issued is no longer valid.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:¹

¹ Montana Code Annotated, 77-2-101

* 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 board may grant easements for "other public uses" in addition to any public use as defined under the eminent domain statute, 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.² Depending on the market conditions in the area where an easement is applied for, the Department of Natural Resources and Conservation may perform an appraisal or set the charge according to a fee schedule.³

Easements may be granted in perpetuity or, in some cases, terminated when the easement use is no longer needed.⁴

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.

The Land Board also has the power to sell state lands.⁵ 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.⁶

² Administrative Rules of Montana, 36.2.1005

³ Tom Schultz, DNRC, phone interview 10/22/07

⁴ MCA, 77-2-105

⁵ MCA, 77-2-301

⁶ Patent to State Land No.F-0068. Approved by Board of Land Commissioners Sept. 17, 2007. Based on Land Banking Sale # 376

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.⁷

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.⁸

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.⁹

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 state constitution.¹⁰

The Constitution states 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."¹¹

The board sets a minimum bid for sales of state lands.¹²

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, local, state or federal government agency. The board determines the terms. However, when rights-of-way

⁷ Arizona Revised Statutes, 37-461

⁸ Arizona Rules, R12-5-801

⁹ Arizona Revised Statutes, 37-314

¹⁰ Colorado Revised Statutes, 36-1-150

¹¹ Colorado Constitution, Article IX

¹² Colorado Revised Statutes, 36-1-124

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.¹³

Idaho

State law allows easements for any public or private purpose or beneficial use.¹⁴

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 percent of land value plus payment for any damage or impairment of rights to the remainder of the property as determined by the 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 but shall not be less than the minimum price for the lands, used, as fixed by law.¹⁵

The price is determined by field inspection or appraisal, and/or subsequent negotiation, or such other method as the commissioner deems best. The price shall 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.¹⁶

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 their true value, and no sale or other disposal shall be made for a consideration less than the value.¹⁷

Oregon

The 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

¹³ Colorado Revised Statutes, 36-1-136

¹⁴ Idaho Code, 58-603

¹⁵ New Mexico Statutes, 19-7-57

¹⁶ New Mexico Administrative Code, 19.2.10

¹⁷ Enabling Act for New Mexico, Section 10.

the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic and animal life.¹⁸

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 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.¹⁹

Easements may be issued for uses and developments which limit the full use or development of state-owned land. Compensation must be the greater of 100 percent 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, 10 to 30 years, or in perpetuity.²⁰

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.²¹ The director also shall establish rules for the issuance of easements on, through, and over any trust land, and may establish price schedules.²²

The School and Institutional Trust Lands Administration may issue exclusive, non-exclusive, 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. Easements terms are not usually 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.²³

Each easement shall contain provisions necessary to ensure responsible surface management, including reservation for mineral exploration and development and other compatible uses. For

¹⁸ Oregon Revised Statutes, 273.051

¹⁹ Oregon Revised Statutes 141-067-140

²⁰ Oregon Administrative Rules, 141-122

²¹ Utah Code Annotated, 53C-4-101

²² Utah Code Annotated, 53C-4-203

²³ Utah Administrative Code, R850-40

conservation easements, the easement must specify the resources being protected and the conditions under which the conservation easement may be terminated.²⁴

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 shall 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 board approval.²⁵

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.²⁶

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.²⁷

However, the department may purchase, lease, set aside, or exchange any public lands which are deemed to be natural areas, provided 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 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.²⁸

The department may transfer fee simple interest or less than fee interests in trust land for the creation of natural resources conservation areas - to be managed by the department - provided 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.²⁹ The department must determine what management

²⁴ Ibid.

²⁵ Utah Administrative Code, R850-80

²⁶ Revised Code of Washington, 79.36.355

²⁷ RCW, 79. 10.110 and 79.10.120

²⁸ RCW, 79.70.040

²⁹ RCW 79.71.050

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.³⁰

Wyoming

The Board of Land Commissioners may grant permanent rights-of-way or easements on state lands for railroads, highways or "other public conveyances."³¹ As further explained in agency rules, easements also may be issued for open space and "any appropriate use."³²

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.³³

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.³⁴ The board must give its final approval for easements.³⁵

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.³⁶

More information

Attached is a comparison of constitutional language among trust land states compiled by the Children's Land Alliance, a non-profit Utah organization that advocates for education beneficiaries on trust land issues. The column labeled "Protections to the Trust" is the one that compares the sale and disposal of trust lands.

The following links provide more information on trust lands and trust management in general, not specific to conservation easements.

³⁰ RCW 79.71.030

³¹ Wyoming Statutes, 36-9-118

³² Wyoming Rules and Regulations, Chapter 3, Section 3

³³ Wyoming Rules and Regulations, Chapter 3, Section 4

³⁴ Wyoming Rules and Regulations, Chapter 3, Section 6

³⁵ Wyoming Rules and Regulations, Chapter 3, Section 7

³⁶ Wyoming Statutes, 36-9-102

More comparisons from the Children's Land Alliance:

http://www.childrenslandalliance.com/school_trusts-CLASS_research-comp.php?ClassSess=3467446522c797d57afa32f3f74a74d4

The Lincoln Institute of Land Policy and the Sonoran Institute produced "Trust Lands in the American West: A Legal Overview and Policy Assessment." It provides an overview of all trust land management issues in the western states. EQC member Diane Conradi was one of the authors.

The publication can be found here: <http://www.trustland.org/publications/trustlands.cfm>

This is a link to an excerpt from the book, "State Trust Lands: History, Management, and Sustainable Use." The authors are Jon Souder an assistant professor of forestry at Northern Arizona State University and Sally Fairfax, a professor of forestry at the University of California at Berkeley. <http://www.fi.org/statetrusts.html>