

STATE OF MONTANA )  
: ss  
COUNTY OF LEWIS AND CLARK )

I, JEANNE WOLF, being first duly sworn, depose and say:

1. I am over the age of 18.
2. I work as a Paralegal for the Montana Attorney General's Office in the Civil Bureau.
3. I have reviewed the State Board of Land Commissioners' (the Land Board's) agenda and meeting minutes from 2013 to the present, that are publicly available at <http://dnrc.mt.gov/landboard/meeting-archive>
4. I have also reviewed the State Board of Land Commissioners' agenda and meeting minutes from 1980 through 2012 as provided by the Department of Natural Resources and Conservation in electronic format via flash drives and e-mail.
5. Based on my review of all the State Board of Land Commissioners' agenda and meeting minutes from 1980 to the present, I created a list of all the conservation easements brought by the Montana Department of Fish, Wildlife and Parks to the State Board of Land Commissioners. The list is in chronological descending order by date of the meeting minutes; includes the name of the conservation easement or project as listed in the meeting minutes; and, indicates the action taken by the State Board of Land Commissioners with respect to each conservation easement. Attached hereto as Exhibit A is a true and correct copy of the list I created.
6. Based on my review of all the State Board of Land Commissioners' agenda and meeting minutes from 1980 to present, the Department of Fish, Wildlife and Parks brought a total of 69 conservation easements to the Land Board for approval. Of those, all but three were approved: 1) on February 20, 2018, the Land Board voted 3-2 to delay consideration of the

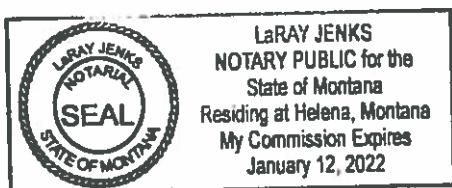
Horse Creek Complex conservation easements; 2) on September 18, 2017, the Land Board voted 3-2 against approval of the Keogh Ranch conservation easement amendment; and, 3) on November 17, 2008, the Land Board voted unanimously 5-0 to reject the Cornwell Ranch conservation easement with instructions to send it back to the Department of Fish, Wildlife and Parks for further negotiations with the landowners.

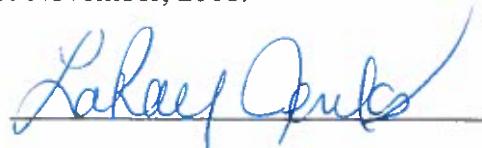
7. From 2009 to the present, the Land Board has voted on 23 conservation easements/projects.
8. Attached hereto as Exhibit B is a true and correct copy of a letter dated April 13, 1992, from Department of Fish, Wildlife and Parks' Wildlife Administrator Don Childress, to Dennis Casey, Commissioner of the Department of State Lands, that was included in the Land Board records and meeting minutes of April 20, 1992, concerning the Snow Crest conservation easement.
9. Attached hereto as Exhibit C is a true and correct copy of the Land Board meeting minutes from November 17, 2008.

DATED this 13th day of November, 2018.

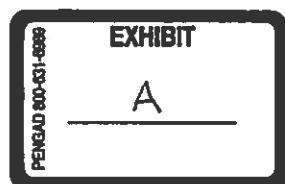
  
JEANNE WOLF  
Paralegal, Civil Bureau  
Montana Department of Justice

SUBSCRIBED AND SWORN to before me this 13th day of November, 2018.



  
LaRay Jenkins

<u>Land Board Meeting</u>	<u>Conservation Easements</u>
3/19/18	FWP: Horse Creek Complex Conservation Easements Withdrawn 3/15/18
2/20/18	FWP: Horse Creek Complex Conservation Easements Substitute motion to delay consideration <b>APPROVED 3-0 (Governor Bullock and Attorney General Fox dissenting)</b>
10/25/17	FWP: Fargo Coulee Conservation Easement Acquisition <b>APPROVED 4-1 (Secretary Stapleton dissenting)</b>
9/18/17	FWP: Keogh Ranch Conservation Easement Amendment <b>FAILED 2-3 (Superintendent Arntzen, Commissioner Rosendale, and Secretary Stapleton dissenting)</b>
8/21/17	FWP: Whitefish Lake Watershed Project (Stillwater Lazy – Swift) – Lazy Creek Conservation Easement <b>APPROVED 5-0</b>
8/21/17	FWP: Keogh Ranch Conservation Easement Amendment Substitute motion to defer until September 18, 2017 Land Board meeting <b>APPROVED 5-0</b>
10/17/16	FWP: Trumbull Creek Conservation Easement <b>APPROVED 5-0</b>
6/20/16	FWP: Conservation Easement – Pintail Flat <b>APPROVED 4-0 (Secretary McCulloch absent)</b>
12/21/15	FWP: Conservation Easement – Haskell Basin Watershed <b>APPROVED 5-0</b>
10/19/15	Implementation of Montana Sage Grouse Conservation Strategy: Executive Order 12-2015 <b>APPROVED 5-0</b>
3/23/15	FWP: Conservation Easement – Lazy J Cross Ranch <b>APPROVED 4-0 (Superintendent Juneau absent)</b>
11/17/14	FWP: Conservation Easement – Pheasant Bend <b>APPROVED 5-0</b>
8/18/14	FWP: Conservation Easement Acquisition – Buffalo Coulee <b>APPROVED 5-0</b>



2/18/14	FWP: Raundal Coulee Conservation Easement <b>APPROVED 5-0</b>
5/20/13	FWP: Murray-Douglas Conservation Easements <b>APPROVED 5-0</b>
10/15/12	FWP: Kootenai Valleys Conservation Easement <b>APPROVED 5-0</b>
10/24/11	FWP: Dugas Conservation Easement (Chokecherry Bend) <b>APPROVED 5-0</b>
11/15/10	FWP: West Swan Valley Conservation Project <b>APPROVED 5-0</b>
11/15/10	FWP: Riverdale Conservation Easement <b>APPROVED 5-0</b>
10/18/10	FWP: Moline Ranch Conservation Easement <b>APPROVED 4-0 (State Auditor Lindeen absent)</b>
8/16/10	FWP: Cottonwood Bend Conservation Easement <b>APPROVED 5-0</b>
8/16/10	FWP: Lower Beaver Creek Conservation Easement <b>APPROVED 5-0</b>
6/21/10	FWP: Lower Brazil Creek Conservation Easement <b>APPROVED 5-0</b>
6/21/10	FWP: North Chamberlain Creek Conservation Project <b>APPROVED 5-0</b>
5/17/10	FWP: Coffee Creek/Pheasants Forever Conservation Easement <b>APPROVED 5-0</b>
11/17/08	FWP: Cornwell Ranch Conservation Easement <b>(Reject the proposal and send it back to FWP for further discussion with the landowners)</b> <b>APPROVED 5-0</b>
6/16/08	FWP: Cornwell Ranch Conservation Easement <b>(Deferred until July Land Board meeting)</b>
5/19/08	FWP: Granger Ranch Wetland Conservation Easement (O'Dell Creek) <b>APPROVED 5-0</b>

5/19/08	FWP: Olsen Ranch Conservation Easement (Brazil Creek) <b>APPROVED 5-0</b>
1/22/08	FWP: Sauerkraut – Willow Creek Conservation Easement <b>APPROVED 4-0 (Secretary Johnson absent)</b>
12/17/08	FWP: Brown Valley Conservation Easement <b>APPROVED 5-0</b>
11/19/07	FWP: Smith River – Deep Creek Conservation Easement <b>APPROVED 5-0</b>
4/16/07	FWP: Bird Creek Ranch Conservation Easement <b>APPROVED 5-0</b>
12/18/06	FWP: Machler Conservation Easement <b>APPROVED 5-0</b>
12/18/06	FWP: Hart Conservation Easement <b>APPROVED 5-0</b>
12/19/05	FWP: Swan Valley Conservation Project – Combination fee title purchase and conservation easement <b>APPROVED 5-0</b>
12/20/04	FWP: Bull River/Lake Creek Conservation Project <b>APPROVED 4-0 (Secretary Brown absent)</b>
8/16/04	FWP: Weaver Slough Conservation Easement <b>APPROVED 5-0</b>
3/15/04	FWP/DNRC: Blackfoot-Clearwater Wildlife Management Conservation Easement <b>APPROVED 3-0 (State Auditor Morrison and Attorney General McGrath absent)</b>
10/20/03	FWP: Gordon Cattle Co. Conservation Easement <b>APPROVED 5-0</b>
8/19/02	FWP: Manley Phase 2 Conservation Easement <b>APPROVED 5-0</b>
5/20/02	FWP: Bice/Hirsch Conservation Easement <b>APPROVED 5-0</b>
8/21/01	FWP: Opsata Lake Conservation Easement <b>APPROVED 5-0</b>

12/18/00	FWP: Dragging Y Conservation Easement <b>APPROVED 5-0</b>
12/18/00	FWP: Cowell Ranch Conservation Easement <b>APPROVED 5-0</b>
11/20/00	FWP: Fluss Ranch Conservation Easement <b>APPROVED 5-0</b>
11/20/00	FWP: Thompson Fisher Conservation Easement <b>APPROVED 5-0</b>
10/16/00	FWP: Badger Creek Conservation Easement <b>APPROVED 5-0</b>
12/18/00	FWP: Manley Ranch Conservation Easement <b>APPROVED 5-0</b>
11/16/98	FWP: Bear Creek (Phase Two) Conservation Easement <b>APPROVED 4-0 (Secretary Cooney absent)</b>
6/22/98	FWP: Hahn Ranch Conservation Easement <b>APPROVED 5-0</b>
3/16/98	FWP: Harris Land & Cattle Co. Conservation Easement <b>APPROVED 4-0 (Superintendent Keenan absent)</b>
2/20/98	FWP: Grady Ranch <b>APPROVED 5-0</b>
12/15/97	FWP: Hirschy Conservation Easement <b>APPROVED 5-0</b>
12/15/97	FWP: Reinoehl Conservation Easement (Clearwater Junction) <b>APPROVED 5-0</b>
8/18/97	FWP: Buxbaum Conservation Easement <b>APPROVED 5-0</b>
8/18/97	FWP: Castlerock Ranch Conservation Easement (Gillies Ranch) <b>APPROVED 5-0</b>
3/17/97	FWP: Bolin/Lewis Ranch Conservation Easements <b>APPROVED 4-0 (Superintendent Keenan absent)</b>
2/18/97	Hirsch Ranch Conservation Easement <b>APPROVED 5-0</b>

12/16/96	FWP: Bay Ranch Conservation Easement <b>APPROVED 5-0</b>
10/21/96	FWP: Cramer Conservation Easement <b>APPROVED 4-0 (Superintendent Keenan absent)</b>
9/16/96	FWP: WH Conservation Easement <b>APPROVED 5-0</b>
8/19/96	FWP: Sieben/O'Connell Conservation Easement <b>APPROVED 5-0</b>
3/18/96	FWP: Keogh Conservation Easement <b>APPROVED 3-0 (Superintendent Keenan and Attorney General Mazurek absent)</b>
11/20/95	FWP: Brown Valley Ranch Conservation Easement <b>APPROVED 5-0</b>
9/18/95	FWP: Dancing Prairie Conservation Easement <b>APPROVED 5-0</b>
4/17/95	FWP: Edwards Conservation Easement <b>APPROVED 5-0</b>
11/21/94	FWP: Bearcreek Angus Ranch Conservation Easement <b>APPROVED 5-0</b>
10/17/94	FWP: Mannix Brothers, Inc. Conservation Easement <b>APPROVED 5-0</b>
10/17/94	FWP: Lloyd and Sandra Maher Conservation Easement <b>APPROVED 5-0</b>
4/20/92	FWP: Snow Crest Conservation Easement <b>APPROVED 5-0 (Turned into a land exchange)</b>
2/22/83	FWP: Blackfoot River Corridor Conservation Easement <b>APPROVED 5-0</b>

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



1420 East Sixth Avenue  
Helena, MT 59620  
April 13, 1992

Mr. Dennis Casey, Commissioner  
Department of State Lands  
1625 Eleventh Avenue  
Helena, Mt. 59620

Dear Mr. Casey:

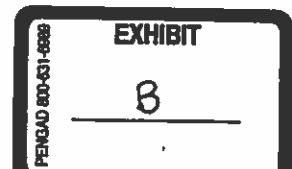
The Montana Department of Fish, Wildlife and Parks in conjunction with the Montana Nature Conservancy has continued to move forward with the proposed conservation easement on the Snowcrest Ranch. At the March 13 Fish, Wildlife and Parks Commission meeting the Commission outlined its terms for the easement. If the Nature Conservancy provided the Commission with their intent to move forward, the public involvement process would continue.

The Nature Conservancy notified the Department on March 23 that the terms were acceptable and that they were willing to proceed. The environmental assessment, socio-economic report, and management plan were prepared by the department and made available to the public on April 2, 1992. The Montana Nature Conservancy also prepared an access document that detailed the access agreement that had been negotiated with the local sportsmen's groups and Mr. von Trapp.

The Commission has scheduled a public hearing in Sheridan, MT on April 15, 1992 to accept additional comment on the proposal. The department and the Conservancy have continued to meet with interested individuals and groups as well as local government to explain the proposal.

It is important to point out that the Commission has not made a decision on whether to purchase the easement at this time. It was made clear at their last meeting that the public input process was critical and that there were concerns that had been expressed that needed to be resolved. The Commission is scheduled to meet on April 16th to make a final decision on the Snowcrest easement.

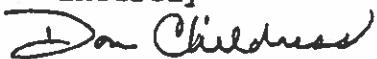
The preparation of the above mentioned documents has resolved a number of the concerns and clarified several points of the easement. Since the transaction would involve a loan by Nature Conservancy there is concern about the status if a default should occur. The department and the Conservancy are not interested in being the owners of the ranch. The Conservancy would place the



ranch on the market with the easement provisions in place.

Statute 87-1-209 requires approval of this easement by the Land Board. If the Fish, Wildlife and Parks Commission decides to purchase the easement, we would like such approval, and we will advise you of the outcome of the April 16 Commission meeting regarding this item and whether or not this agenda topic needs to be carried to your April 20 Land Board.

Sincerely



Don Childress, Administrator  
Wildlife Division

413.2

**MINUTES**  
**REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS**  
**Monday, November 17, at 9:00 a.m.**  
**State Capitol Building, Room 172**  
**Helena, MT**

**PRESENT:** Governor Brian Schweitzer, Attorney General Mike McGrath, Secretary of State Brad Johnson, and Superintendent of Public Instruction Linda McCulloch

**VIA TELEPHONE:** Auditor John Morrison

Ms. McCulloch moved for approval of the minutes from the October 20, 2008, meeting of the Board of Land Commissioners. Seconded by Mr. McGrath. Mr. Morrison and Mr. Johnson were absent for this vote. Motion carried 3-0.

**BUSINESS CONSIDERED:**

**1108-1 DEPARTMENT OF COMMERCE: FINAL APPROVAL FOR THE TRANSFER OF THE MALTA DINOSAUR MUSEUM TO THE CITY OF MALTA**

*Mr. Johnson joined the meeting.*

Ms. Sexton stated this is final approval for the 351 (77-2-351, MCA) transfer of the Great Plains Dinosaur Museum to the City of Malta.

Kelly Casillas, Department of Commerce attorney, stated that Commerce has completed one environmental assessment and an updated appraisal since preliminary approval was granted by the Land Board (October 15, 2008). The State Historic Preservation Office indicated there were no historical resources that would be affected. A Real Property Agreement was drafted for the city of Malta, specifying control and purpose, including a revisionary clause allowing control of the facility to revert to the state should the city fail to adhere to the specified parameters of purpose.

Anne Boothe, Phillips County Economic Growth Council executive director/Judith River Foundation member, stated that the city of Malta is capable of owning and operating the museum. She thanked Commerce for their assistance in the proposed transfer.

Carolyn Schmoeckel, Judith River Foundation president, spoke of the strong working relationship between the foundation and the city.

*Mr. Morrison joined the meeting via telephone.*

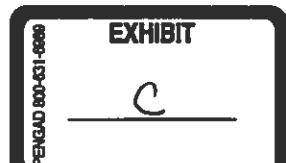
Byron Ereaux, mayor of Malta, stated that the city has taken a very active role in the development of, and participation in the museum. He emphasized the commitment of the city to ensure the success of the museum.

Motion made by Ms. McCulloch for final approval of the transfer. Seconded by Mr. McGrath.

Mr. McGrath reiterated that the agreement is written in order to be concise in the expectations of the state for the operation of the museum. The correct contingencies are in place should reversion of ownership ever need to be considered.

Motion carried unanimously.

**1108-2 FWP: CORNWELL RANCH CONSERVATION EASEMENT**



Ms. Sexton stated this is a proposal from FWP to purchase a conservation easement on the Cornwell Ranch property.

Paul Sihler, FWP Field Services Administrator, outlined the history of the project.

- In 2005, FWP created the Comprehensive Conservation Strategy to identify species and critical habitats that were necessary to be conserved in order to prevent future endangerments.
- Two key areas identified were the Big Hole Valley and the Glaciated Plains area.
- The Milk River Initiative was launched in regard to the Glaciated Plains area. The initiative included conservation easements on various areas surrounding portions of the Cornwell Ranch.

Mr. Sihler noted that the ranch is 24,000 acres and holds grazing leases on an additional 100,000 acres of BLM and DNRC land. The cost of the conservation easement would be \$5,050,000 (\$210/acre). The property supports diverse wildlife species, including whitetail deer, antelope, sage grouse, sharp-tailed grouse, turkey, pheasant, waterfowl, and migratory songbirds.

Mr. Sihler noted that this area has been prioritized by the Nature Conservancy and the World Wildlife Fund as being a globally significant area of short-grass prairie and home to several species of at-risk grassland birds. The easement would prevent development and subdividing, sodbusting, use rest-rotation to manage grazing, and would allow permanent hunting access.

The proposal had previously brought before the Land Board in June 2008, but was deferred in order to address DNRC concerns that mandated rest-rotation would have an adverse effect on the competitive bids for future grazing leases. FWP has discluded the DNRC land in the grazing management. Other concerns that were addressed were:

- DNRC concern that the easement would restrict access to four isolated parcels. To address that concern, the Cornwell Ranch committed to nominating the property for sale under the land banking program if the conservation easement was approve and completed. The Cornwell Ranch agreed to place \$1 million in escrow for the purchase.
- The language of the conservation easement has been revised to allow for new access roads to reach two sections of school trust lands that do not currently have road access.

Mr. Sihler stated that FWP received 48 public comments in support of the project, and two comments opposed to the project. Additionally, there was one concern about shooting areas, which has been addressed.

Dave Dietrich, Cornwell family attorney, stated that the many months of negotiation reflect a balance between the property owner rights and Montana trust stewardship rights. He noted that the project would bring tremendous benefit to the Cornwell family, the many sportsmen organizations, and the conservationists of the area.

Mr. Dietrich stated that there have been disproportionately fewer acres dedicated to conservation easements in the northeastern portion of Montana than in other parts of the state. Conservation easements offer a means of preserving legacy ownership, and create a system of checks and balances between the property owners and the state government.

November 17, 2008  
LAND BOARD MINUTES

Debby Cornwell asked the Land Board for their support of the conservation easement. She emphasized the Cornwell family's history of land stewardship, conservation, and the family's commitment to preserve that legacy.

Lee Cornwell, co-owner of the Cornwell Ranch, noted that much of northeastern Montana has lately been purchased by out of state interests. The desire he and his two brothers shared was, and remains, to protect and preserve the land as undisturbed as possible for future generations.

Ted Schye, former state Representative from Glasgow, offered his support of the project. He stated that over the years he has heard feedback from area residents and sportsmen who are in favor of this type of preservation. Mr. Schye referenced the 1987 Legislative Session, during which House Bill 526 was enacted with the intent of creating conservation easements or fee title purchases. Over the years it has become more difficult for hunters to locate access.

Janet Ellis, Montana Audubon Society, reiterated the importance of preserving the area because it is the best remaining short-grass prairie in the country. She noted the concerns over the price of the project, but said that despite the high cost, there was potential for the state to generate return revenue as a result of the proposed land banking consideration.

Motion made by Mr. Johnson to approve the conservation easement. Seconded by Ms. McCulloch.

Governor Schweitzer stated that USDA regulations already protect this land from being sodbusted. He referenced the outrage expressed by his opponent [Roy Brown] in the recent gubernatorial pre-election debates over the state purchasing such large tracts of land. He questioned the appraised value attached to the land at this time, citing both his credentials as a soil scientist and an individual who buys and sells ranches. He stated that appraisals completed on similar tracts have values significantly lower than the Cornwell Ranch. He expressed his concerns over the valuation, as well as his understanding of the importance of legacy and preservation. Governor Schweitzer referenced a map to illustrate existing access to state and BLM land. He reiterated his understanding of the subjective nature of the appraisal process, and his concerns that the appraised value of this land is significantly higher than similar properties.

Mr. Morrison expressed his misgivings over the expense of the project. He stated his understanding of the importance of preserving this grassland. He inquired if there was potential for additional price negotiations?

Mr. Dietrich stated that he believed the Wheeler appraisal (which was used as a basis to determine the value of the Cornwell land) to be consistent with current, comparable sales value. The Cornwell family is open to negotiation. Mr. Dietrich asked the Land Board to provide additional methods to review other appraisals.

Mr. Morrison stated that since the Cornwell family is willing to enter into additional discussion regarding valuation, he does not believe the Land Board should consider approving this project at this time.

Mr. McGrath stated that he appreciates the efforts of FWP in creating this proposal. He also stated his understanding of the easement's significance, but expressed concern regarding the impact that such an expensive purchase might have on the viability of future projects. Mr. McGrath concurred with Mr. Morrison's above statement.

November 17, 2008  
LAND BOARD MINUTES

Mr. Johnson offered a substitute motion to his earlier motion. The new motion was, "...to direct the appropriate staff members from FWP and DNRC to enter into further negotiations with regard to the price." Substitute motion seconded by Ms. McCulloch.

Ms. McCulloch stated her support of conservation easements, particularly for those in northeastern Montana; but, she expressed concern about the appraisal price. She stated that it has been her goal as a member of the Land Board to offer fair market value for land.

Mr. Morrison requested the board vote on the substitute motion to reject the current proposal in favor of the parties' renegotiating the project value.

Governor Schweitzer stated, "The substitute motion before the Land Board is to reject the proposal and send it back to FWP<sup>1</sup> for further discussion with the land owners."

Substitute motion carried unanimously.

*Mr. Morrison withdrew from the meeting.*

**1108-3      FWP: HAGLER RANCH ACQUISITION – ELK ISLAND MANAGEMENT AREA  
ADDITION AND FISHING ACCESS SITE**

Mr. Sihler stated that FWP would acquire 163.43 acres for \$332,822. Funding is from the Habitat Montana and Access Montana programs. The acquisition would provide boat access, as well as a fishing access site. It would protect the riparian habitat, broaden the footprint of the existing wildlife management area, and prevent subdivisions. The acquisition would also allow FWP to reclaim 70 acres of irrigated cropland, which would be restored to native riparian vegetation and provide dense nesting and brood cover for resident wildlife.

There were no comments in opposition. Nine comments were received expressing support.

Motion made by Mr. McGrath to approve the acquisition. Seconded by Mr. Johnson. Carried 4-0 (Mr. Morrison absent).

**1108-4      FWP: NORTH SHORE STATE PARK AND WILDLIFE MANAGEMENT AREA**

Mr. Sihler stated that funding for this project is primarily from the Access Montana Program. Additional funding is from the Doris Duke Charitable Foundation, along with private funding raised by the Flathead Land Trust. The appraised value of the property is \$1,890,000. The project is the first step of the "River to Lake Initiative," and the intent of project is to combine disparate parcels to facilitate the preservation of the area (including a USFWS waterfowl production area). There is a proposed 250-acre development near Somers. That development was denied by Flathead County, but a new proposal is being negotiated.

FWP received 52 comments expressing support of the project in order to preserve the habitat of the area, preclude development along the North Shore, and allow greater public access.

<sup>1</sup> Governor Schweitzer did not include DNRC in the action because the appraisal of the Cornwell Ranch conservation easement is an FWP matter and does not involve the DNRC.

Motion made by Ms. McCulloch to approve the acquisition. Seconded by Mr. McGrath. Carried 4-0 (Mr. Morrison absent).

**1108-5 FWP: SUN RIVER/LEWIS ACQUISITION**

Mr. Sihler stated that access along the Sun River is limited, and that this acquisition would provide greater access on both sides of the river for approximately one mile. The cost for this acquisition is \$235,000. The original property owner has died since the initial approval by the Land Board of the 134 acres in [June] 2005, and there was consideration for the property to be sold for a gravel pit. FWP determined it was preferable to purchase the entire 164.07 acres rather than the 134 acres.

Motion made by Mr. McGrath to approve the acquisition. Seconded by Mr. Johnson. Carried 4-0 (Mr. Morrison absent).

**1108-6 CORRAL CREEK CBNG PLAN OF DEVELOPMENT**

Ms. Sexton presented an environmental assessment (EA) for the plan of development (POD). The project was proposed by Fidelity Production and Exploration and is tiered to an environmental impact statement (EIS) performed in 2003 by the federal government and the Montana Board of Oil and Gas Conservation (MBOGC). The DNRC received several comments expressing concern over sage grouse habitat and potential draw-down of the Tongue River Reservoir. These comments are addressed in the EA.

The proposal is for 23 CBNG wells. Seven would be on school trust land, and one would be near the reservoir on land owned by the DNRC Water Resources Division. Ms. Sexton noted that the Land Board had requested all EAs for CBNG be brought before the board.

Beth Kaeding, Northern Plains Resource Council chair, said that one of the core principals of the organization is stewardship. NRPC is not inherently opposed to CBNG, but the focus is that it be performed correctly and safely. NRPC also believes that the economic, environmental, and social costs of doing business in Montana should not be transferred to the general public. NRPC successfully entered into litigation in federal court regarding the 2003 EIS. The supplemental EIS was released on November 7, 2008. Only twice in eight months did the gauging stations along the Tongue River indicate levels below the accepted standards of non-degradation. Ms. Kaeding expressed concern that some of the proposed wells are located on the shores of the reservoir. She requested that the DNRC wait until the final and supplemental EIS are completed and to tier the EA to those.

Art Hayes, Jr., Tongue River Water Users Association president, expressed concern about the loss of water from the reservoir, as well as the potential for reverse flow back to the reservoir. Additionally, there is a fault line that bisects the reservoir. Since 2002 there has been a significant amount of venting through the fault line.

Mr. Hayes stated that the main concern is Montana's current involvement in litigation with the state of Wyoming over the Yellowstone Compact. Part of the compact addresses the loss of water to the Tongue River from CBNG development. TRWUA also has concerns regarding litigation with Wyoming involving standards. The water produced by state wells would be discharged back into the river through a discharge permit. The non-degradation standards cannot be met with the discharge permit.

TRWUA was notified one week ago that water discharged under the permit does not pass the toxicity test—aquatic life is dying. Colstrip High School has in the past

monitored aquatic life below the dam and has reported the loss of many salt-sensitive species.

Mr. Hayes stated that he has attended several meetings in Wyoming, which is proposing watershed permitting that would allow a certain amount of water to be dumped into every watershed that is permitted. He stated that when he addresses the audience at these meetings, the Fidelity Exploration and Production permit is presented as an example of what they opposed to. His opposition asks why if Montana allows "x" amount of water, Wyoming should not be allowed to do likewise? The irrigators of the Tongue River are bearing the cost of highly salinized water being introduced into irrigation water.

Mr. Hayes requested that the Land Board vote against accepting this EA and ROD.

*Mr. Morrison rejoined to the meeting, via telephone.*

Brenda Lindlief-Hall, TRWUA attorney, reiterated that the potential for the loss of water is significant. While the Land Board is accountable only for the stewardship of school trust lands, the cumulative impact from the proposal will be adverse. The development relies on permits held by Fidelity to dispose of the CBNG wastewater. At least one of the permits is being challenged by the Northern Cheyenne Tribe for being invalid, as the permit does not incorporate best available technology as required by the *Federal Clean Water Act* and the *Montana Water Quality Act*.

Denise Wood, Diamond Cross Ranch, stated that it would be premature to grant approval at this time, as water management practices have been negligible.

Jon Metropoulos, Fidelity Production and Exploration attorney, stated that there are Fidelity representatives available to address any questions and concerns.

Motion made by Mr. McGrath to deny the Corral Creek CBNG plan of development. Seconded by Mr. Morrison.

Mr. McGrath stated that Montana is currently involved in active litigation with the state of Wyoming on several fronts regarding the Tongue River, particularly, the enforcement of the Yellowstone Compact. He expressed significant concerns that if the Land Board approves the project there will be an impact on the validity of the stance Montana is taking in the litigation. Mr. McGrath stated that there is conflicting hydrological information from the EA and other Reserved Water Right Compact Commission documents. The information is more specific to the site of the proposal. He noted that there have been a series of violations regarding the testing of the discharge. Mr. McGrath stated that there needs to be more information available.

Motion to deny carried 4-1 (Mr. Johnson dissenting).

**1108-7 TIMBER SALE: MOSQUITO CREEK**

Ms. Sexton stated this timber sale is on 161 acres and is for seed tree harvest, commercial thinning, and shelterwood. It will require 2.79 miles of new road construction and 1.8 miles of reconstruction/reconditioning, which will also be used for future harvests. There is a grazing lease that will be suspended for the duration of the harvests.

Motion was made by Ms. McCulloch to approve this timber sale. Seconded by Mr. McGrath. Carried unanimously.

Ms. Sexton informed the land board that the DNRC will be issuing mailings for Habitat Conservation Plan. There will be a public comment period covering bull trout, other fish species, grizzly bear and lynx.

1108-8

**FINAL APPROVAL FOR SALE OF LAND BANKING PARCELS:**

*Ms. Sexton gave a brief overview of each county.*

**A. BLAINE COUNTY**

The parcels in Blaine County range from 5 to 640 acres. The public auction was held on October 30, 2008. All parcels had only one bidder per parcel, and were all sold for the minimum bid. All parcels were appraised with access value. The total amount for all parcels is \$324,450. The average price was \$250 per acre.

Motion made by Mr. Johnson for final approval of the sale of parcels in Blaine County. Seconded by Ms. McCulloch. Carried unanimously.

**B. CHOUTEAU COUNTY**

The parcels in Chouteau County range from 40 to 102 acres. All the parcels are isolated. Public auction was held on October 29, 2008. There was no competitive bidding and all parcels sold for the minimum bid. The average price was \$260 per acre, for a total amount of \$227,366.

Motion made by Ms. McCulloch for final approval of the sale of parcels in Chouteau County. Seconded by Mr. McGrath. Carried unanimously.

1108-9

**SET MINIMUM BIDS FOR LAND BANKING PARCELS**

*Ms. Sexton gave a brief overview of each county.*

**A. FERGUS COUNTY**

There are four parcels in Fergus County. One parcel is 0.48 acres and has county road access. The remaining parcels are 80 acres and have no legal access.

Motion made by Mr. McGrath to approve the minimum bid as appraised, with access, in Fergus County. Seconded by Ms. McCulloch. Carried unanimously.

**B. MISSOULA COUNTY**

The parcel in Missoula County is 40 acres, has legal access from Six-Mile and Wapiti roads, and is surrounded by private residences. The parcel included units from the Roman Creek timber sale, which will be harvested prior to the sale closing.

Motion made by Mr. Johnson to approve the minimum bid in Missoula County. Seconded by Mr. McGrath. Carried unanimously.

**C. TOOLE COUNTY**

The parcels in Toole County range from 6.28 to 640 acres. Some of the parcels are accessible from Highway 2, but provide no recreational opportunities as they are close to the ranch headquarters of the nominating lessee. All parcels were appraised with access only.

Motion made by Mr. McGrath to approve the minimum bids in Toole County. Seconded by Ms. McCulloch. Carried unanimously.

**D. WHEATLAND COUNTY**

There are three parcels in Wheatland County. Parcel No. 462 is accessible from Highway 12 and contains improvements owned by the Duncan Colony. Discharge of firearms is prohibited due to the proximity to colony developments.

Motion made by Ms. McCulloch to approve the minimum bid, as appraised with access, in Wheatland County. Seconded by Mr. McGrath. Carried unanimously.

**1108-10 FINAL APPROVAL FOR DEBRUYCKER FARM LAND BANKING ACQUISITION**

Ms. Sexton stated the DeBruycker farm is 5211.98 acres, with a mix of cropland, CRP, rangeland, and roadways. The property has two wind anemometers stationed on Teton Ridge. It also offers very good hunting, hiking, and bird watching opportunities. The purchase price is \$4,980,000. The rights to any wind energy development will be shared with the state. The property offers a 3.5 percent ROI for the Common Schools Trust, and from three to five percent ROI for the MSU Morrill and Public Buildings trusts.

Mark DeBruycker, co-owner, stated that the family appreciates the considerations that were given to them during the negotiation process.

Motion made by Mr. Johnson for final approval of the land banking acquisition. Seconded by Mr. McGrath. Carried unanimously.

**1108-11 RIGHT-OF-WAY APPLICATIONS**

Ms. Sexton singled out two ROW applications:

- The application from Debra Williams is on land that has been nominated for land banking. The historic access agreement would take place prior to the sale of the property.
- The application from the city of Belgrade is for a public recreation park and school related agricultural use.

Motion made by Ms. McCulloch for approval of the easements. Seconded by Mr. McGrath.

Ms. McCulloch stated that the Belgrade school district is excited for the developments that may come about from approval of the easement.

Motion carried unanimously.

Motion to adjourn made by Mr. Johnson. Seconded by Mr. McGrath. Carried unanimously.

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**MEMORANDUM**

**To:** Martha Williams, Director  
**From:** Zach Zipfel, Agency Legal Counsel  
**Re:** Land Board Approval of Conservation Easements  
**Date:** March 23, 2018

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**Question Presented**

Whether, Mont. Code Ann. § 87-1-209 requires the Department of Fish, Wildlife and Parks (“FWP”) to obtain Land Board approval for conservation easements?

**Brief Answer**

While the Department has taken conservation easements over 100 acres or \$100,000 in value to the Land Board out of courtesy, the plain language of Mont. Code Ann. § 87-1-209, as well as other statutes, does not require Land Board approval for FWP to acquire or hold a conservation easement.

**Discussion**

**Title 87**

Mont. Code Ann. § 87-1-209, **Acquisition and sale of lands or waters**, subsection (1) provides:

Subject to 87-1-218 and subsection (8) of this section, the department, with the consent of the commission or the board 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.

(Emphasis added). Mont. Code Ann. § 87-1-218, **Notice of proposed land acquisitions**, subsection (1) requires that, “*For all land acquisitions* proposed pursuant to 87-1-209, the department shall provide notice to the board of county commissioners in the county where the proposed acquisition is located.” (Emphasis added). Among other things, this notice “must include”

*an estimate of the property taxes payable on the proposed acquisition and a statement that if the department acquires the land pursuant to 87-1-603, the department would pay a sum equal to the amount of taxes that would be payable on the county assessment of the property if it was taxable to a private citizen....*

Mont. Code Ann. § 87-1-209(3)(c) (emphasis added). Notably, by statute, the Department does not pay taxes on conservation easements. *See* Mont. Code Ann. § 76-6-208(1). It does, however, pay taxes on those properties it owns in fee.

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Mont. Code Ann. § 87-1-603 uniformly speaks of the Department “owning” or “purchasing” land and also sets out various guidelines for the Department when paying taxes. It also provides exceptions to when the Department must pay taxes.

Read together, §§ 87-1-209, 87-1-218, and 87-1-603 provide insight into the meaning of the reference in § 87-1-209 to “land acquisition.” Both -209 and -218 refer to “land acquisition” by the Department. Section -218 further requires a notice be sent to counties for Department “land acquisitions.” Those notices “must” include an estimate of property taxes to be paid on the “proposed acquisition.” As indicated above, by statute, the Department does not pay taxes on its conservation easements. It does pay taxes on its fee properties. Consistent with this reading, § -603 spells out circumstances under which the Department pays taxes on properties it “owns” or is “purchasing.” The implication from these statutes is that “land acquisition” means property the Department owns or is purchasing in fee and is, thus, obligated for payment of taxes. Indeed, if “land acquisition” meant something less than fee title, why would the Department be required in § -218 to provide an estimate of property taxes payable on the property in its notice to the county?

This is also consistent with a plain reading of § 87-1-301, which sets forth the powers and duties of the Commission and which provides that the Commission, “shall approve *all acquisitions* or transfers *by the department of interests in land or water....*” The Legislature explicitly gave the Commission broader responsibility vis-à-vis Department acquisitions than it gave the Land Board. The Commission must approve “*all acquisitions... of interests in land....*” This includes all means of acquiring property set out in § 87-1-209, including “purchase, lease, agreement, gift, or devise and... easements upon lands....” It spans the range of outright fee title to something less such as a lease.

The Land Board’s responsibility, however, is a subset of this, limited only to “land acquisition involving more than 100 acres or \$100,000 in value.” Basic rules of statutory construction dictate that where the Legislature uses different language, it must be assumed it was done so deliberately. Thus, while the Commission must approve “*all acquisitions... of interests in lands...*,” the Land Board is limited to only actual “land acquisition” and only where such acquisition is “more than 100 acres or \$100,000 in value.” And, as discussed above, the strong implication in §§ 87-1-218 and -603, is that “land acquisition” means property which the Department “owns” or “purchases” and on which it pays taxes. This does not include conservation easements.

*Legislative History*

There is no Montana caselaw addressing this question. The legislative history of § 87-1-209, however, reinforces the idea that “land acquisition” means fee title purchase.

In 1981 the Legislature amended § 87-1-209, adding the language at issue here: “in the case of land acquisition involving more than 100 acres or \$100,000 in value, the approval of the board of land commissioners(.)” During the session, there were two competing bills, both of which attempted to provide additional oversight of the Department’s land acquisitions. HB 251 would have amended § 87-1-209 to grant approval authority to the Legislature for Department land acquisitions. As Rep. Aubyn Curtiss testified, both bills were a result of the “deep concern many

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Montanans share over the continual erosion of our tax base, brought about by land acquisition policies of the Department of Fish, Wildlife and Parks.” S. State Admin. Comm. Testimony of Rep. Curtiss (March 6, 1981). According to Rep. Curtiss, HB 251 was necessary because “the latitude given this Department to *buy and sell real estate* has not been in the best interest of Montana taxpayers, nor has it enabled the Department to better manage Montana’s wildlife.” *Id.* (emphasis added).

HB 251 failed, in large part because legislative oversight was impractical with the Legislature only convening every two years. In its place, HB 766 passed, granting the Land Board oversight for Department land acquisitions. Noting that the bill had been coming before the Fish and Game Committee for years, Chairman Ellison explained, “There is a reason. People want some elected official to take responsibility of land purchases.” H. Fish and Game Comm. Minutes (February 19, 1981). Initially HB 766 assigned oversight to the governor. It was later amended to give that oversight to the Land Board.

HB 766 passed over opposition from FWP and Governor Schwinden. Larry Fasbender, on behalf of the governor, voiced opposition, explaining that, “This bill politicizes the purchase of state lands.” S. State Admin. Comm. Minutes (March 20, 1981). FWP Director Jim Flynn testified that while, “The problem this bill seeks to address is the claimed excessive purchase of land by the Department of Fish, Wildlife and Parks,” in fact, “The department does not purchase these lands without due consideration.” *Id.* (enclosed testimony). Flynn further explained that, “The department is not going to have a major budget for large land purchases in the upcoming biennium, but to the extent that a willing seller appears with the potential for protecting wildlife habitat and providing fishing and other recreational opportunity... this bill will add to the bureaucracy necessary in making that acquisition.” Senator Hammond noted that “the problem is that this bill points to the fact that it is necessary for the fish and game to own land. Why cannot they lease land and leave it on the tax rolls(?)” *Id.* Director Flynn “concurred that possible leasing will have to be investigated.” *Id.*

Other Statutory Authority

The conservation easement statutes in Title 76 also refer to conservation easements as “interests in land,” rather than outright “land acquisition.” For instance, Mont. Code Ann. § 76-6-201 provides: “Where a public body acquires under this chapter *an interest in land less than fee*, this acquisition shall be by conservation easement.” Likewise, § 76-6-207 requires conservation easements to be recorded in the same county where the property lies, “so as to effect the land’s title in the manner of other conveyances of interest in land....” Similarly, in the Open-Space Land and Voluntary Conservation Easement Act, which authorizes public bodies to acquire conservation easements, the Legislature found “*the acquisition or designation of interests and rights in real property*,” was in the public’s interest. Mont. Code Ann. § 76-6-102(2)(f). The Act itself defines conservation easements as:

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

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of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

Mont. Code Ann. § 76-6-104(2) (emphasis added). This definition of conservation easements follows the Montana Supreme Court's characterization of easements generally as, "[A] non-possessory interest in land, '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.'" *Kuhlman v. Rivera*, 216 Mont. 353, 358, 701 P.2d 982, 985 (1985) (discussing right-of-way easements).

Reading the statutes in this manner also brings them in line with the constitutional role and duties of the Land Board, which is to maximize income to the state from school trust lands. Consistent with this, § 77-1-202 makes clear that:

The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. 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
- (b) provide for the long-term financial support of education.

Land held by the Department, however, is subject to a different set of statutory directives, as provided in § 87-1-209:

- (a) for fish hatcheries or nursery ponds;
- (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.

None of FWP's statutes direct the Department to derive income from the property.

**Conclusion**

Reading FWP's statutes, in conjunction with the conservation easement statutes, leads not only to the conclusion that conservation easements are "interests in land," but also that the Legislature made an intentional distinction between "interests" and outright "land acquisition." Reading these statutes against the backdrop of the Land Board's authority to manage state lands to

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maximize income to the trust, leads to the conclusion that § 87-1-209 does not require the Department to obtain Land Board approval for conservation easements.