

LAND EXCHANGE POLICY

Montana Board of Land Commissioners

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INTRODUCTION

This policy was developed by the Montana Board of Land Commissioners ("Board") for the purpose of guiding applicants for land exchanges and providing direction to the Department of Natural Resources and Conservation ("Department") to ensure timely and orderly processing and review of land exchange proposals.

This inclusive and consistent land exchange policy is needed for future consideration of beneficial exchange proposals. The criteria and text contained within this policy document are intended as guidance only. Legal requirements, which shape the Board's review of land exchanges, are found within the Montana Constitution, state statutes, and administrative rules. The Montana Constitution provides that pursuant to Article X, subsection 11(4), 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. Additionally, Mont. Code Ann. § 77-2-207 states: "[t]he [B]oard has the power and it is its duty to disapprove any exchange which in its opinion would be disadvantageous to the state." Conversely, the Board has a duty to approve any exchange which, in its opinion, would be advantageous to the state.

The Board has an affirmative obligation to administer trust lands so "as to secure the largest measure of legitimate advantage" for the beneficiaries. State v. Stewart, 48 Mont. 347, 349, 137 P. 854, 855 (1913). The ability of the state to effectively manage the public land trust for the support of education, however, has been limited by the fragmented ownership of the 5.2 million acres of state trust lands. The Board is often hindered in securing the largest measure of legitimate advantage because many trust land parcels are landlocked or isolated. Exchanging isolated parcels of trust lands for private land that is contiguous to other public land will allow the Board to fulfill its trust obligations by increasing rental income, expanding public access, and reducing administrative expenses resulting from managing isolated and noncontiguous parcels.

Given the broad discretion granted to the Board, the following policy will assist applicants and Department personnel in evaluating how the Board will review the merits of a particular exchange. The goal is to promote exchanges that produce an advantage to the state and its trust funds and to discourage exchanges that are disadvantageous to Montana. A

subjective, but practical, rule of thumb the Board will use in approving an exchange is to assure itself the trade is a "good deal" for the state.

The process of submitting a land exchange application can be costly and time consuming; numerous laws and trust principles govern the process. Applicants who study this policy and evaluate the merits of a proposal prior to submitting an application should avoid the costs and frustration of unfavorable review by the Department or Board. Significant public participation opportunities remain and are enhanced in this policy change.

Public interest groups may also participate with an applicant as a "co-sponsor." These organizations are encouraged to identify potential lands to be acquired, reach out to landowners which surround state trust land parcels to gauge interest, and support an applicant's initiation of a land exchange consistent with the criteria and trust obligations set forth in this policy.

Public participation is an important component to any proposed land exchange. This policy contemplates at least seven opportunities (highlighted below) for the public to openly review and participate in the land exchange process.

1. The Department shall create and maintain an evolving list of interested parties to any proposed land exchange. Upon receipt of an application for an exchange, the Department shall notify interested parties on this list of the application submittal.
2. The Department will give notice of the proposed exchange to any person who has leased or who holds a license for any portion of state land involved in the exchange.
3. The public can submit public comments at any time during the Department's preliminary review period, the summary of which will be provided to the Board.
4. The public can provide comment during the Board's regularly scheduled meeting which constitutes the preliminary review by the Board.
5. There are public comment opportunities during the Montana Environmental Policy Act (MEPA) review.
6. The public can attend and participate in the public hearing contemplated by this policy and required by Mont. Code Ann. § 77-2-204(2).
7. The final public participation opportunity is before the Board at its final review and approval (or disapproval) of the proposed exchange.

Table of Contents:

- Land Exchange Criteria:
 1. Equal of greater value
 2. State land bordering on navigable lakes and streams

3. Equal or greater income to the trust
 4. Equal or greater acreage
 5. Consolidation of state trust lands
 6. Potential for long-term appreciation
 7. Access
- Use of Consultant to Facilitate Administration of Proposed Land Exchanges
 - Preliminary Review Process
 1. Review by the Department
 2. Review by the Board
 - Review by the Department
 - Final Review and Approval by the Board

LAND EXCHANGE CRITERIA USED DURING THE PRELIMINARY REVIEW BY THE DEPARTMENT

1. Equal or greater value

Land to be acquired by the state must be “equal in value” to land being exchanged. The Board views the constitutional directive to be a minimum and will favorably consider exchanges in which the land received by the state is significantly more valuable. The starting point for this determination is the value, in terms of money, of the real estate in a typical market as determined through an appraisal conducted by a real estate appraiser certified in accordance with Mont. Code Ann. § 37-54-101, *et seq.* The appraiser must coordinate with the Department and the consultant (discussed below) prior to conducting an appraisal. The appraisal will be completed once the Board directs the Department to proceed with a full review of the exchange as set forth herein.

The value of exchanged state lands must be determined by the highest and best use of the land, not simply the present use. This use may be determined based on agricultural opportunities, natural resource development, proximity to urban areas, commercial or industrial developments, need for housing within local communities, recreational use opportunities, or market-based valuations related to wildlife and other conservation attributes.

In general, trust land must be valued for its highest and best use taking into consideration limited access, no access, or other limiting factors (e.g., a commercially

reasonable discount must be applied to the value assigned to state exchanged lands that do not have documented legal access or are otherwise "checkerboarded"). This valuation process will apply to exchanges with federal or state governmental entities at the discretion of the Department, recognizing that the federal government only allows for adjustments if they are supported by market evidence.

Mont. Code Ann. § 77-2-205 prohibits exchanges that encourage "large scale commercial, industrial, or residential development," unless the value of the resulting development is considered in determining the value of the exchanged lands. Consequently, if an exchange is proposed in which state lands classified for the production of crops will be used by an exchange applicant for commercial development, the exchanged state land is appraised based on its potential for commercial development, instead of its value as agricultural land. Likewise, if an exchange is proposed in which state lands hold significant wildlife habitat and provide significant recreational value, the state exchanged land is to be appraised considering these values.

The Department shall instruct an appraiser to consider all market-reflected factors (e.g., legally documented public access) in evaluating the relative value of both the state exchanged lands and the acquired lands in accordance with the Uniform Standards of Professional Appraisal Practice.

The Department shall further instruct the appraiser to consider such values as location, proximity to public lands, recreational opportunities, scenery, and other amenities in determining relative property values. The Department must also identify and consider if there are any other factors associated with the exchange which benefit the people of Montana, such as offers by the applicant to provide for future lessee improvements, assist with site cleanup of the acquired lands (e.g., demolition of dilapidated buildings), support for build-out of infrastructure for items that benefit the public (e.g., roads, trail heads, parking facilities, etc.), proposed enhancements to public health or safety, and whether the acquired lands include a residence or other improvements which could be segregated and sold for the trust's economic benefit.

2. State land bordering on navigable lakes and streams

According to Mont. Code Ann. § 77-2-203(3), state lands that border navigable lakes, streams, and other bodies of water with significant public use values may only be exchanged for lands that border similar bodies of water. The Board interprets this requirement not to mean that lands within the same watershed or even county must be exchanged, but simply that the public use value is maintained or increased within the acquired lands. For purposes of this criterion, "with significant public use values" is a qualitative consideration associated with "navigable lakes, streams, and other bodies of water" and as such is further defined as water resources that have a documented history

of being meaningfully used for crop irrigation, livestock watering, fishing, recreational floating activities or waterfowl hunting.

3. **Equal or greater income to the trust**

A land exchange must result in the state receiving equal or greater income for the trust. Unless an alternative specific income stream has been identified and confirmed by the Board to be reasonable, the projected income for the lands acquired by the state will be estimated at the current minimum lease rate. This income will be compared to the present income to the trust of the lands to be exchanged from all leases, licenses and other sources such as income activity associated with recreational use (e.g., revenue generated by projected user days under Mont. Code Ann. § 77-1-801). For purposes of comparison, the Department will also consider identifiable future incomes, including income from the extraction of natural resources such as minerals and forest products, telecommunication leases, as well as recreational value. Where state lands proposed for exchange generate greater income than lands to be acquired, the applicant may design and propose a method of compensating the trust to satisfy this criterion.

4. **Equal or greater acreage**

As set forth above, the Montana Constitution requires that exchanged state lands and acquired lands be, "as closely as possible, equal in area." The Board interprets this language to allow the consideration of exchanges that would not result in the exchange of virtually identical acreages. For example, the Board might consider receiving less acreage in an exchange, in return for property that has substantially higher value or generates more income, or both. Conversely, if the acquired lands provide a significant increase in acreage, the Board can still consider the "good deal" attributes of a proposed exchange.

5. **Consolidation of state lands**

In general, the Board must "place priority on exchanges that result in consolidation of state lands into more compact bodies." See Mont. Code Ann. § 77-2-2303(2). Thus, a land exchange should be at least neutral in its net effect on the consolidation of state land: the exchange must not further fractionalize state land holdings by creating isolated parcels of state land). Similarly, an exchange should not sever a mineral estate from a surface estate, unless any portion of the mineral estate of the acquired lands is already severed and where the mineral estate ownership is different than the applicant. Consolidation of state lands facilitates land administration, and aggregated state land often has greater value and revenue potential.

6. Potential for long-term appreciation

The land acquired by the state should be as likely to increase in value or revenue potential as the state land exchanged. It is essential that the Board protects the long-term interests of the trust. Assuming that other criteria are satisfied, and no outstanding public benefits accompany the exchange, rapidly appreciating residential or recreational property will not be exchanged for agricultural land although the parcels have equivalent present value.

7. Access

A land exchange should not diminish or eliminate access to other state or other public lands. Accessible state land that is proposed for exchange should be replaced with acquired lands that offer similar recreational opportunities (this does not mean identical). State lands with public access often have greater income-generating potential because surface uses are subject to competitive bids. For example, state lands that currently have a source for public access are also eligible for exchange if the acquired lands offer public access to previously "landlocked" state lands or other public lands. As alluded to in criteria #5 and further described in the below section dealing with Board review, exchanges that eliminate public access conflicts associated with "landlocked" state lands will be favorably considered. Although not technically "accessible state lands," acquired lands in an exchange that provide new or enhanced public access to other public lands (e.g., Bureau of Land Management, Forest Service, etc.) should also be favorably considered when evaluating this criterion. Acquired lands that offer unique public access characteristics will be given additional weight in the criteria analysis (e.g., documented presence of big game species like elk, bighorn sheep, mountain goats, moose, and antelope; the acquired lands offer unique access to important water ways, historical artifacts, or rare geological or terrain features).

Criteria Summary & Statement of Intent:

The Department and the Board are statutorily obligated to ensure fulfillment of criteria numbered one through three (value, lands bordering water bodies, and income). If a trade satisfies all the criteria and results in significantly higher income or land values being added to the trust, the exchange would be a "good deal" for the state. Another example of a favorable exchange might involve the transfer of an isolated or "landlocked" state parcel (a state section that is surrounded by private land), where the proposed trade satisfies all the criteria, and the lands to be acquired are adjacent to public lands with public access.

The Board recognizes that some land exchanges may clearly be in the state's best interests, but such exchanges may fail to satisfy criteria four through seven (acreage,

consolidation, potential for appreciation, access). In instances where the presence of outstanding public benefits clearly makes the exchange advantageous to the state, the Board may still consider and approve a proposed land exchange based on the outstanding merits of the proposal. Such public benefits might include the substantial reduction of management costs, increased recreational opportunities, economic growth, enhancement of environmental interests such as wildlife habitat or water quality, public safety, preservation of the social structure of a community or other identifiable benefits to the state.

Where a proposed exchange simply satisfies the exchange criteria, the Board may still exercise its discretion to suspend further review and disapprove the application as disadvantageous to the state so long as that decision is based upon sound fiduciary and administrative principles associated with trust oversight and management.

USE OF CONSULTANT TO FACILITATE ADMINISTRATION OF PROPOSED LAND EXCHANGES

The Board recognizes that reviewing proposed land exchanges requires a considerable amount of time and expertise, and the Department may not have the resources to review each application in a timely fashion. Therefore, the applicant may nominate and pay for an independent consultant to assist the Department. In general the use of a consultant is strongly encouraged unless: (1) the applicant's retention of a consultant would create a significant financial hardship for the applicant; or conversely (2) the applicant possesses sufficient resources, expertise and experience to accomplish the tasks contemplated by the consultant in this policy (in which case, the scope of work must be agreed upon in writing and executed by the Department and applicant). The purpose of the consultant is to help ensure that the applicant's efforts are complete, while also reducing the workload for state agency personnel.

1. The applicant, in consultation with the Department, selects a consultant to assist the Department in reviewing the land exchange proposal and to facilitate the state's administration of the land exchange process. The selected consultant should demonstrate previous experience with facilitation of government land transactions by providing the Department with a statement of qualifications, including references. The consultant must secure written authorization from the applicant to facilitate the exchange and submit a copy of that written authorization to the Department.
2. The Department, applicant, and consultant shall discuss the proposal and then agree upon a scope of work to be completed by the consultant. The scope of work may include, but is not limited to, - preparation of legal notices for the Department, contracting for approved appraisal services, contracting with approved experts to prepare information to support the MEPA analysis, securing title commitments, obtaining surveys, timber cruising, planning and facilitating the public hearing called for in Mont. Code Ann. § 77-2-204, reviewing and summarizing public comments, etc. The scope of work may include

consultant-retained qualified professionals, such as certified appraisers and surveyors. The agreement shall include estimated deadlines for completing each task and an estimate of the costs.

3. The contract for consultant services will be considered as a three-party agreement between the Department, consultant and applicant. The consultant's activities will be directed by the Department. The applicant must pay for all fees and costs incurred by the consultant, regardless of whether the land exchange is approved. The Board and the Department shall have no responsibility for paying the consultant or any qualified professionals retained by the consultant.

PRELIMINARY REVIEW PROCESS

1. Preliminary review by the Department

Within ninety (90) days after a correct and complete application is submitted to the Board (or a longer period if agreed upon by the applicant), the Department shall prepare a preliminary report for the Board that includes the following:

- (a) A summary of the application, including how the applicant intends to satisfy the seven exchange criteria;
- (b) The Department's technical review of the proposed land exchange, including a description of the outstanding public benefits, if any, attendant with the exchange;
- (c) An applicant's rebuttal, if any, to the Department's technical review;
- (d) A summary of the qualifications of the proposed consultant, if any, and the scope of work to be completed by the consultant;
- (e) Whether the applicant has committed to fund the costs of the consultant, if any, and the scope of work to be completed by the consultant; and
- (f) Attach any letters of endorsement from supporters or co-applicants as well as provide a summary of public comment submitted by the public, or through the consultant/applicant.

DNRC may request that the Board approve an extension of not more than 90 additional days to complete the preliminary review.

2. Preliminary review by the Board

Upon receipt of the Department's preliminary report, the Board shall consider the applicant's proposal and the Department's report at a regularly scheduled meeting. The Board may make one or more of the following decisions:

- (a) Direct the Department to proceed with a full review of the exchange and to complete the other legal requirements necessary for the Board to consider and potentially approve the proposed land exchange;
- (b) If the applicant has nominated a consultant to assist the Department, the Board may approve or reject the use of the consultant;
- (c) Reject the proposed land exchange outright;
- (d) Deny the proposed land exchange but request that the applicant submit a modified application to address specific issues identified in the initial review; or
- (e) Direct the Department to complete specific and narrow tasks relative to the merits of the proposed land exchange and report back to Board with findings before proceeding further.

REVIEW BY THE DEPARTMENT

If approved by the Board, the Department will proceed with its review of the proposed exchange and other legal requirements. If the Board also approves using the consultant, the Department, applicant, and consultant shall execute a written contract obligating the consultant to complete the agreed-upon scope of work by the established deadlines. The deadlines may be extended based upon mutual agreement of the applicant, Department, and consultant. The Department will monitor the progress of the consultant and report monthly to the staff for each member of the Board as specific information is generated and further review authorization is required.

Mont. Code Ann. § 77-2-204(2) requires a public hearing to be held in the county containing the state land to be exchanged. This hearing may be facilitated and otherwise conducted by the consultant or the Department. The public shall be given advance notice of the hearing as required by statute. To be considered in the Department's final report to the Board, public comment concerning the proposed land exchange may be provided either before or during the hearing.

The Department shall solicit and consider any comments and feedback provided by the staff of each member of the Board.

Upon completion of its review, the Department (with the assistance of the consultant) shall prepare a final report concerning the proposed land exchange and submit it for the Board's consideration. This report will be made available to the public prior to any Board action.

FINAL REVIEW AND APPROVAL BY THE BOARD

When the Board is satisfied that the Department and applicant have generated all information necessary for its decision, the proposed land exchange will be placed on the agenda for the next meeting of the Board. It is the Board's duty to approve any exchange which in its opinion would be advantageous to the state, or conversely, disapprove of any exchange which would be disadvantageous to the state. The Board shall state its reasons for approving or disapproving any land exchange and such reasons shall be reflected in the minutes of the Board's meeting.