PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Montana Legislative Services Division

Legal Services Office

March 29, 2007

Senator Aubyn Curtiss
PO Box 200500
Helena, Montana 59620-0500

Dear Senator Curtiss:

I am writing in response to your request for an opinion as to the legality of the Legislature authorizing the placement of conservation easements on school trust lands. Section 76-6-104, MCA, defines a "conservation easement" as an easement or restriction, running with the land and assignable, under which an owner of land voluntarily relinquishes to the holder of the 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. Section 76-6-202, MCA, provides that conservation easements may be granted either in perpetuity or for a term of years. Section 76-6-203, MCA, provides that conservation easements may prohibit or limit any or all of eight enumerated uses of the land. A conservation easement is not a traditional type of easement.

An easement is a grant of the use of and not a grant of title to the land. An easement is a servitude attached to the land. See section 70-17-101, MCA, and Bolinger v. City of Bozeman, 158 Mont. 507, 493 P.2d 1062 (1972). Section 70-17-106, MCA, provides that the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. An easement is a "property right" protected by constitutional guarantees against the taking of private property without just compensation. City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212 (1950). In Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941), the Montana Supreme Court defined an easement as a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon land. By contrast, a conservation easement is not designed to permit a use of land, but to prohibit certain uses of land. A conservation easement may be described as the sale of the right to change the existing use of the land or a sale of the right to develop the land.

The 2001 Legislature authorized the placement of conservation easements on state land by enacting Senate Bill No. 159, as Chapter 230, Laws of 2001. That law amended section 77-2-101, MCA, authorizes the Board of Land Commissioners to grant conservation easements on state land to the Department of Fish, Wildlife, and Parks for parcels that are surrounded by or adjacent to land owned by the department 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 in Flathead County.

In addition, section 77-2-319, MCA, requires the Board of Land Commissioners to grant to the state a conservation easement for cabin sites, home sites, or city or town lots sold pursuant to section 77-2-318, MCA. The granting of the conservation easement to the state on the land sold is conditioned upon that action being consistent with the Board's trust responsibility. Those conservation easements are required to run with the land in perpetuity and must prohibit subdivision of the land, lake, or stream and for property within 100 feet of a river, stream, or lake, prohibit the cutting of trees except as necessary for construction on the lot, fire prevention, safety, or protection of personal property, and require that any permanent structure be set back 25 feet from the high-water mark of a lake or stream. The conservation easement requirements for the sale of state land were authorized by the 1989 Legislature by enacting Senate Bill No. 91 as Chapter 602, Laws of 1989.

Article X, section 11(2), of the Montana Constitution provides that state land or any estate or interest in state land may not be disposed of except in pursuance of general laws or until the full market value of the interest disposed of, determined as provided by law, is paid to or secured to the state. Section 77-2-106, MCA, 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 to 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 is also authorized to accept in-kind payments of services and materials equal to the full market value of any easement upon state trust land. Pursuant to the existing statutes and any statutes that might be enacted by the 60th Legislature, the Board of Land Commissioners is required to receive full market value for the conservation easement that is granted on state land. While the valuation of the "development rights" disposed of by the granting of a conservation easement may be difficult, that does not make the grant illegal. For example, see Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 Mont. 105, 119 P.3d 27 (2005), in which the Montana Supreme Court upheld the methodology for determining the "current market value" of a future stream of a future mineral royalty stream. 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.

In your letter you also reference perpetuities, so I will also address that issue. This will give me the opportunity to relive a painful part of my law school experience. Article XIII, section 6, of the Montana Constitution provides, "No perpetuities shall be allowed except for charitable purposes". This provision was carried forward unchanged from the 1889 Montana Constitution. The case of In re Swayze's Estate, 120 Mont. 546, 191 P.2d 322 (1948), indicates that the constitutional provision is based upon the "Rule Against Perpetuities". The Rule Against Perpetuities is a common law principle prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years, plus a period of gestation to cover a posthumous birth, after the death of some person alive when the interest was created. Under the common-law rule, the test is not whether an interest actually will vest more than 21 years after

the life in being, but if there exists any possibility at the time of the grant, however unlikely, that an interest will vest outside of the perpetuities period, the interest is void and is stricken from the grant. I will refrain from discussing corollary issues such as mortmain, the fertile octogenarian rule, and the unborn widow problem. The need to discuss these mind-bending complexities is unnecessary, because Montana has adopted the Uniform Statutory Rule Against Perpetuities, Title 72, chapter 2, part 10, MCA. The Uniform Statutory Rule Against Perpetuities was devised in order to avoid the complexities of the common law rule and to put clearer limits on the period of time and who is affected by the rule. Section 72-2-1002(1), MCA, modifies the common-law rule by providing that a nonvested property interest is invalid unless: (a) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (b) the interest either vests or terminates within 90 years after its creation.

In any event, it does not appear that the Rule Against Perpetuities would apply to a conservation easement that is granted in perpetuity, because the easement "vests" in the entity purchasing the easement at the time of the transaction.

I hope that I have adequately addressed your question. If you have additional questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

cc: Senator Dave Lewis
Senator Verdell Jackson

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