

LAND EXCHANGE POLICY

Montana Board of Land Commissioners
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Revised December 2004

INTRODUCTION

This policy was developed by the Montana Board of Land Commissioners for the purpose of guiding applicants for land exchanges and the Department of State Lands (now Department of Natural Resources and Conservation) in the processing and review of land exchange proposals. The policy may be used by an exchange applicant or Department of Natural Resources and Conservation (department) personnel to roughly evaluate the prospects of obtaining favorable review by the Board of Land Commissioners (board).

The ability of the state to effectively manage the public land trust for the support of education has been limited by the fragmented ownership of the 5.2 million acres of state trust lands. An 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. Selected legal provisions are included in the appendix to this policy. Two key-provisions merit emphasis. The Montana Constitution provides:

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.

Mont. Const. art X, § 11 (4) Additionally, Mont. Code Ann. § 77-2-207 provides:

The board has the power and it is its duty to disapprove any exchange which in its opinion would be disadvantageous to the state.

Given the broad discretion granted the board, the following policy will assist applicants and department personnel in evaluating how the land board will review the merits of a particular exchange. The goal is to promote exchanges which produce an advantage to the state and its trust funds and to discourage exchanges which are disadvantageous to Montana. A subjective, but practical, rule of thumb the board will use in approving an exchange is assuring itself the trade is a "good deal" for the state.

The process of submitting a land exchange application is 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.

The land exchange process may, at the department's discretion, be facilitated by the proponent of the land exchange. To facilitate the process:

1. The proponent, in consultation with the department, selects a contractor to administer the land exchange process.
2. The entity(ies) contracted to complete the tasks associated with the land exchange will receive written instruction from the department on the scope of work for all tasks, including, but not limited to appraisal, MEPA analysis, survey, timber cruising, etc.
3. The contractor(s) will provide the proponent with an estimate of costs based on the scope of work determined by the department.

4. The proponent must enter into a written and signed agreement with the department to pay for mutually agreed upon costs associated with the land exchange.
5. The department reviews and determines the adequacy of all documents used in the land exchange.
6. All documents produced for the land exchange by the contractor and appraiser are the property of the department.
7. The department is the decision making authority in the Montana Environmental Policy Act (MEPA) analysis, and retains all authority and responsibility to manage the land exchange process and provide recommendations to the board.
8. The contractor bills the proponent of the land exchange directly upon department approval of the deliverables.

PRELIMINARY EVALUATION BY THE DEPARTMENT

To streamline the review process, the department will initially screen exchange proposals. Proposals that satisfy the land exchange criteria described below will be offered for public comment by the department. Following solicitation of public comment, the department will prepare a report and forward the exchange proposal to the board for review authorization. Proposals which do not meet the criteria or fail to comply with Montana law may be rejected by the department Director following preliminary evaluation by the department without review by the board.

The board recognizes that some land exchanges may clearly be in the state's best interests, but may fail to satisfy all seven criteria outlined below. The department and the board are unable to waive the fulfillment of criteria numbered one through three (value, lands bordering water bodies, and income). These criteria are based on legal requirements. However, in exceptional circumstances where the presence of outstanding public benefits clearly outweighs the absence of one of the other exchange criteria (acreage, consolidation, potential for appreciation, access), the department may waive satisfaction of the criterion, solicit public comment during preliminary evaluation, and forward the proposal to the board for its review.

A. Land Exchange Criteria

1. Equal or greater value

Land to be acquired by the state must be at least as valuable as the state land being exchanged. The starting point for this determination is the value, in terms of money, of 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 department may use information provided by the applicant or its own knowledge of affected lands and resources to estimate value for purposes of preliminary evaluation. Following review authorization by the board, a certified appraiser must be retained to estimate value as per Uniform Standards of Professional Appraisal Practices. The appraiser must consult with the department regarding the scope of work prior to conducting an appraisal.

The value of exchanged state lands must be determined by the highest and best use of the land, not simply the present use. For example, if the exchange were proposed in which the state lands were currently leased for grazing and the land was in the path of urban or commercial development, the land would be considered for valuation in the appraisal to its highest and best use for residential or commercial development rather than the present use as grazing land.

In general, trust land must be valued in two ways. First, the highest and best use of the land with discounts applied to the land for access or other limiting factors. Second, the highest and best use of the land without any discounts. The department will then arrive at a value for trust land proposed for exchange, and make a recommendation to the board. This valuation process will apply to exchanges with federal or state governmental entities at the discretion of the department.

Mont. Code Ann. 9 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 considering its developed, commercial value instead of its value as agricultural land.

The department will consider intrinsic values in evaluating the relative value of lands to be exchanged. By definition, these types of values are often not reflected in the market price and are difficult to assign a dollar amount. Regardless, the department will attempt to consider such values as location, proximity to public lands, recreational opportunities, scenery, and other amenities in determining relative value.

2. State land bordering on navigable lakes and streams

According to Mont. Code Ann. § 77-2-203(2), 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.

3. Equal or greater income to the trust

A land exchange must result in the state receiving equal or greater income for the trusts. The projected income for the lands acquired by the state will be estimated at the minimum lease rate, without speculating about possible competitive bidding. This income will be compared to the present income to the trusts of the lands to be exchanged from all leases, licenses and other sources. 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. 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 trusts 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 return for substantially higher value or income, or both. As a general rule the board prefers to receive equal or greater acreage.

5. Consolidation of state lands

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. The department will place priority on exchanges which result in *consolidation of state lands in accordance with Mont. Code Ann. § 77-2-203. 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 department and the board protect the long-term interests of the trusts. 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 the amount of access to state lands or other public lands. Accessible state land that is proposed for exchange should be-replaced with acquired lands-that offer similar recreational opportunities. Additionally, state lands with public access often have greater income-generating potential because surface uses are subject to competitive bids.

B. Solicitation of Public Comment

Provided the department determines that a proposed land exchange satisfies all the exchange criteria or has outstanding public benefits, public comment will be solicited. The department will solicit comment through mailings to interested parties, newspaper advertisements or public meetings. Additionally, 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. The department will prepare a written summary of all public comment received on the proposed exchange.

C. Preliminary Report by the Department

Following the department's preliminary evaluation and public comment period, the department will forward the proposed exchange to the board for review authorization. The department will prepare a preliminary report for the board that includes the following:

(1) a summary discussion of how the exchange meets or exceeds each of the seven exchange criteria; (2) a summary of public comment received on the exchange; (3) a description of outstanding public benefits, if any, attendant with the exchange; (4) department concerns or opinions of the merits of the proposed exchange; (5) department recommendations for specific direction from the board for further review, if any, of the proposed exchange; and (6) an indication of the applicant's commitment to fund the costs of the department's detailed review or the department's commitment to assume or share these costs.

The evaluation of land exchange proposals creates a substantial demand upon department personnel and no funding has been allocated for these efforts.

Consequently, the board will not grant the department review authority unless the private applicant agrees to pay for ascertainable review costs the department is unable to assume--staff time, environmental assessment, cultural inventory, natural resource inventories (timber cruise or mineral survey where necessary), public hearing, title reports, and appraisals. The payment of such costs does not assure that the applicant will receive favorable review by the board. The department or other public agency may elect on a case-by-case basis to assume or share review costs of any private exchange determined to warrant the assumption of such obligations. Where an exchange applicant is a governmental agency, the board may direct the department to share the payment of costs.

Although an exchange minimally meets the established exchange criteria, the department may recommend in its report to the board that the exchange be disapproved as disadvantageous to the state. The board recognizes that some land exchanges may minimally meet legal and policy criteria but not create an advantage to the state that would justify further review or approval.

II. REVIEW AUTHORIZATION BY THE BOARD

Upon receipt of the department's report, the board shall consider the specific recommendations of the department and public comment, and evaluate the merits of the land exchange. The board will determine at this stage whether further review and public hearing by the department are justified.

The board may grant the department blanket authority to direct the completion of all documents necessary for final consideration of the exchange, including an environmental assessment, cultural inventory, and land appraisals, and to conduct a public hearing. Alternatively, the board may direct the department to complete specific and narrow tasks relating to the merits of the exchange and report back to the board with findings before proceeding further. For example, the board might direct the department to complete a timber cruise and appraisal of timber value on particular state lands proposed to be exchanged before any further action is taken.

It is the Board's strong preference that a proposed exchange not only meet the identified criteria, but provide a clear public benefit by exceeding one or more criteria. For example, if a trade satisfies all the criteria and results in significantly higher income or land values being added to the trusts, 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. Where a proposed exchange simply satisfies the exchange criteria, the board may exercise its discretion to suspend further review and disapprove the application as disadvantageous to the state.

Finally, as previously stated, a proposed land exchange may only minimally satisfy the exchange criteria (or fail to meet one of the criteria numbered four through seven), but present outstanding public benefits that clearly make the exchange advantageous to the state. 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, preservation of the social structure of a community or other identifiable benefit to the state. While

these exchanges are the exception to the rule, the board in extraordinary circumstances may review the public benefits identified and authorize the department to complete a detailed review.

III. REVIEW BY THE DEPARTMENT

Acting under the direction of the board, the department will direct the preparation of a study reviewing the merits of the proposed exchange, environmental consequences, effects on cultural resources, appraised land values and any other factor deemed to affect the public interest. The department will report back to the board as specific information is generated and further review authorization is required.

Mont. Code Ann. § 77-2-204(2) requires that the department conduct a public hearing on the proposed exchange in the county containing the state land to be exchanged. Written notice of this hearing will be provided to any person who has leased or held a license on any portion of land involved in the proposed exchange. The department should conduct the public hearing at such time as details of the final exchange proposal are established and sufficient information is available to promote meaningful comment.

Upon final completion of its tasks, the department will present a detailed report and its recommendation to the board for final review and approval. The department's report and recommendation will be made available to all interested parties prior to any board action.

IV. 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 information will be reviewed and a determination made whether the proposed exchange is advantageous to the state. It is the board's duty to disapprove any exchange which in its opinion 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.

APPENDIX TO LAND EXCHANGE POLICY

Selected Legal Provisions
January 18, 1994

Montana Constitution, Article X, section 11

Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. 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.

Montana statutes applicable to the exchange of state land generally:

77-2-201. Exchange of land with United States- or tribal governments. (1) (a) The board may enter into contracts or agreements with the United States or any department thereof having jurisdiction for the waiving and relinquishment to the United States of any rights of the state in and to sections 16 and 36 of any township and to any other parcel of state lands, provided that the state shall, in lieu of the rights so waived and relinquished, receive from the United States other lands of equal or greater value.

(b) The current user of the land transferred to the United States may continue to enjoy the use of the land under terms and conditions required by the federal government and in accordance with P.L. 88-607, as amended, (43 U.S.C. 1411 through 1418), and the current user of the land received from the United States may continue to utilize the land on the terms and conditions imposed by law or by the board.

(2) The board may enter into a contract or agreement with a tribal government as defined in 18-11-102 or with the United States for the relinquishment to the tribal government or to the United States in trust for the tribal government of any rights of the state to some or all state lands located wholly within the exterior boundaries of the tribal government's reservation as recognized by the federal government; however, the state, in exchange for these relinquished rights, must receive from the tribal government or the United States lands of equal or greater value. No contract or agreement may be entered into under this section without first consulting with the board of county commissioners of the county or counties in which the lands to be exchanged are located.

77-2-202. Exchange of land with counties. The board may accept on behalf of the state title in fee simple to any land owned by a county in the state and may convey in exchange therefore state land of approximately the same area and of a value not higher than the land received from the county if the exchange will result in consolidating the state lands into more compact bodies.

77-2-203. Exchange for private land. (1) The board is authorized to exchange state land for private land provided that the private land is of equal or greater value, as determined by the board after appraisal by a qualified land appraiser, than the state land and as closely as possible equal in area. The contents of the appraisal must be made available to any person who makes a written request to the board. The board shall place priority on exchanges which result in consolidation of state lands into more compact bodies. This section does not apply to exchanges undertaken under 76-12-107 [natural areas].

(2) If the requirements of subsection (1) and 77-2-204 are met, state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for private land if the private land borders on similar navigable lakes, streams, or other bodies of water.

77-2-204. Notification of proposed exchange - hearing. (1) Upon receipt of a proposal for an exchange of land under this part, the board shall give notice of the proposed exchange by certified mail to each person who has leased, under chapter I of this title, any portion of land involved in the proposed exchange. Any such leaseholder may present written or oral comments on the proposed exchange to the board before or during the hearing required by subsection (2). The notice must contain a statement informing the recipient of this right to comment.

(2) A public hearing on any exchange under this part shall be held in the county containing the state land to be exchanged. When specific objections to the proposed exchange are raised before or during any such hearing pursuant to subsection (1), the board shall make findings of fact responding to such objections and explaining their action.

77-2-205. Restriction on exchange for private land. No exchange under 77-2-203 shall be made which will induce or encourage large-scale commercial, industrial, or residential development unless the value of such development is considered in determining the fair market value and unless the proposed development will not adversely affect the resources of the existing state tracts or those tracts which the state would receive under the proposed exchange.

77-2-206. Settlement for improvements. If any state land is exchanged on which there are improvements belonging to a lessee and some person other than the lessee is the transferee, that person shall settle with the lessee for all improvements on the land belonging to the lessee before the exchange is completed. The provisions of 77-6-301 through 77-6-306 relating to the payment and settlement for improvements on state lands between a former lessee and a new lessee apply to the settlement between a lessee and the transferee in an exchange. If settlement is not reached within 6 months of date of exchange, all improvements become the property of the state unless the department for good cause shown grants both parties additional time in which to exhaust arbitration.

77-2-207. Approval or disapproval of exchanges. All exchanges of state lands are subject to approval and confirmation by the board, and no exchange is considered completed until after such approval and confirmation. The board has the power and it is its duty to disapprove any exchange which in its opinion would be disadvantageous to the state.

Montana statutes applicable to the exchange of timbered, cut-over, or burned-over lands:

77-1-204. Power to sell, lease, or exchange certain state lands.

(2) The board shall have full power and authority to sell, exchange or lease lands under its jurisdiction by virtue of 77-1-214 [lands donated for forestry purposes] when, in its judgment, it is advantageous to the state to do so in the highest orderly development and management of state forests and state parks. Said sale, lease, or exchange shall not be contrary to the terms of any contract which it has entered into.

77-2-211. Exchange of timbered, cut-over, or burned-over lands. The board may accept on behalf of the state title in fee simple to any timbered lands or lands from which the timber has been cut or burned and in exchange therefore may convey not to exceed an equal value, as determined by the board after appraisal by a qualified land appraiser, of similar state land. However, no such exchange may be made except that which in the opinion of the board will benefit the public interest. For the purpose of such an exchange, all state lands, including those referred to in 77-2-303(3), 77-2-311, and 77-5-101, are subject to be offered for such exchange, and any restrictions against their sale or disposal are, for the purpose of such an exchange, released.

77-2-212. Rules. The board shall adopt and promulgate such rules and methods of procedure affecting or touching the exchanges of lands under 77-2-211 through 77-2-217 as in its judgment seems advisable to the end that the public interests may be conserved.

77-2-213. Department to investigate. When a proposal for an exchange pursuant to 77-2-211 is made and the owners of the respective tracts involved seem agreeable to negotiate such exchanges, the proposal shall be referred to the department and the department shall thoroughly investigate all the lands involved in the proposal and estimate the value of all of the lands and consider every factor in connection with the proposal as may affect the public interest.

77-2-214. Investigation and findings concerning exchange of land. (1) The department shall, as soon as it concludes its investigation thereof, report to the board the facts disclosed by its investigation and include in its report a recommendation concerning the proposal, including its reasons therefor in writing.

(2) After considering the report and recommendation and making such further investigation as it considers advisable, the board shall consider the entire matter, make findings and conclusions concerning the proposal, and make an order:

(a) Rejecting and dismissing the proposal if in the judgment of the board the exchange is not in the public interest; or

(b) Accepting the proposal and ordering the exchange to be made if in the judgment of the board the exchange is in the public interest and should be made.

(3) An order accepting the proposal shall contain an accurate description of all lands to be exchanged.

77-2-215. Notice and hearing concerning exchange of timbered lands. If the board approves a proposal for exchange pursuant to 77-2-211, the department shall publish at least once in some newspaper of general circulation in each county in which any of the lands involved are located a notice stating in general terms the proposal and describing the lands involved and ownership thereof. The notice shall fix a day not less than 20 and not more than 60 days from the date of the first publication at which the board will hear objections to the proposed exchange and at which any person, firm, or corporation may appear in person or by representative and be heard.

77-2-216. Final order of board. The board shall make a final order describing the terms of the proposal for the exchange of the land involved and shall either dismiss the proposal as not being in the public interest or direct the proper officers to proceed to complete the exchange, as authorized by 77-2-211.

77-2-217. Status of exchanged lands. All lands taken in exchange under 77-2-211 through 77-2-216 for lands granted by the United States to the state of Montana prior to July 1, 1931, shall be subject to the same restrictions, limitations, and provisions as the lands granted by the United States are now subject to. All lands granted by the state in carrying out such exchanges shall thereafter be free from the restrictions and limitations provided by The Enabling Act of the state of Montana or the other grant from the United States.