ACCESS ROAD EASEMENT POLICY

Montana Board of Land Commissioners
September 18, 2006

Introduction

It is the intent of the Access Easement Review and Valuation Policy to amend and replace the Private Driveway Policy adopted by the Montana Board of Land Commissioners [Board] on June 19, 1995, subsequently amended on August 16, 2004. During the years the Private Driveway Policy has been in effect, changes have occurred in easement statutes enacted by the state legislature. The passage of several laws may be construed as providing inconsistent application of the Private Driveway Policy in the review and processing of easement applications for access roads by the Montana Department of Natural Resources and Conservation [Department].

The Access Road Easement Policy is developed by the Board and Department for the purpose of guiding applicants and the Department in the review and processing of applications for easements providing access to private lands for multiple uses. The policy may be used by an easement applicant or Department personnel to evaluate the prospect of obtaining a favorable review by the Board. This policy is not intended to be used to review and evaluate applications for easements made by any county, city or state agency for a public access road or for applications received under 77-1-130, MCA, Historic Rights of Way.

The criteria and text contained within this policy are intended as guidance only. Legal requirements, which shape the Board's review of all easement applications, are found with the Montana Constitution, state statutes and administrative rules.

Generally, access roads upon state trust lands may be granted for single or multiple family residences, farm and ranch management, timber resource management or all lawful purposes. Right-of-way grants for access roads enhance the value of private property while detracting from the value of the state land. While the State receives full market compensation for the property interest disposed of, this compensation often does not capture the superior value afforded to private lands as a result of enhanced access. This is especially the case in those instances wherein the private lands are considered for development. Furthermore, rights-of-way reduce the flexibility of state land management while increasing the risk of liability to the State. Since the duty of the Board and Department is to act as trustees and protect the long-term productivity of trust lands for the beneficiaries, care must be taken to create situations where rights-of-way benefit the trust. Means of minimizing detriment to the trust when granting rights-of-way include consideration of alternative road location, assurance that environmental impacts are mitigated, evaluation with reference to a specified set of criteria, and capture of revenue consistent with development potential.

The evaluation criteria and easement valuation methods contained in this policy generally articulate board policy with respect to access roads and will be applied to all applications currently in review by the Department and any new applications received after the effective date of this policy. Easements for access roads may be perpetual or term. The Board and the Department reserve the right to grant limited term easements to protect the long-term interests of the trust. Applicants will be given the opportunity to discuss the merits of a grant for perpetual easement, rather than a limited term easement, before the Board.

Given the broad discretion granted by the Board, the criteria set forth below will assist the applicant and Department in evaluating how the Board will review the merits of a particular access application.

Review and Evaluation by the Department

Prior to the filing of any application for an access road easement, potential applicants shall be provided a copy of this policy. Before an applicant goes to the expense of surveying a proposed road, field review should be conducted by staff to determine the purpose and necessity of the right-of-way, as well as potential locations of alternative access that minimize or eliminate impact to state lands. Additionally, staff should discuss with applicant whether or not they have the ability to reciprocate access to the state. Any permits required by other state and/or local authorities should be applied for by the applicant prior to review of the application for easement. See evaluation criteria number three below.

All private road access easements for the purpose of access to one single family residence and/or farm and ranch activities and timber and resource management shall be limited to a maximum width of 30 feet, unless additional width is deemed necessary by field staff. All applicants requesting easements shall be subject to the easement valuation formula discussed on pages four (4), five (5) and six (6) of this policy.

The following outline provides direction to access easement applicants:

- Potential applicants should contact the local Department land office to evaluate the proposed access request prior to filing any application materials;
- Applicant will be asked to reciprocate access to the state and will make application under the Reciprocal and Easement Exchange Policy if such an opportunity exists;
- Applicant must provide one original and one copy of completed right of way application on the form provided by the Department;
- Applicant must provide one original and one copy of survey or plat of the proposed access road right of way that has been prepared by a licensed surveyor or professional engineer. If a previous easement has been granted on

the same access road and a legal survey is on record with the Department, applicant may contact the owner of the survey and request permission to utilize the existing survey;

- Applicant must provide original signed Notice of Settlement of Damages statement from the lessee of the State land if the parcel is leased;
- Applicant must provide a statement of necessity signed by the applicant that explains why access is needed across state trust lands. Said statement should include a discussion of what other alternative(s) are/were available and the reasons the alternative(s) is/are not viable. If applicant is not able to provide a reciprocal easement to the state, applicant must provide an explanation as to why it is not possible;
- Applicant must provide a map that indicates the applicant's ownership as well as that of the immediate adjacent landowners to be used in conjunction with the discussion statement of alternative routes;
- Applicant must provide proof of current ownership of private land(s) to be accessed such as copies of property deeds or tax statements;
- Applications made in the name of two or more family members or friends to access lands owned independently by each shall specify the exact ownership of each party and copies of current ownership documents will be required for each. In addition to the land value assessed for the access road easement, conveyance fees for each additional parcel of land and/or residential housing unit being accessed will be assessed per the easement valuation formula discussed on pages five (5) and six (6) of this policy;
- Applicants may be required to provide additional information upon request by the Department, including information necessary to complete an environmental assessment.

Department personnel will evaluate all applications for consistency with this policy and provide a recommendation to the Board for approval or denial and whether perpetual or term. Department staff will provide the Board with an explanation supporting their recommendation that addresses how the application satisfies or fails to satisfy the criteria.

Access Road Evaluation Criteria

The Board and Department will review applications for easements for access roads considering the following criteria:

1. Whether the granting of the easement will enhance the school trust asset;

2. Easement impacts on the capacity of the affected trust lands to be developed and produce future revenue and the extent to which the routing of the

proposed easement mitigates impacts. As a practical matter, easement routes that follow state section lines or minimally cross state section corners are preferred;

3. Compliance with all applicable federal, state, and local laws, especially in the case of planned subdivision development on adjoining private lands. The applicant should demonstrate the extent to which the proposed easement is consistent with federal, state and local management plans;

4. Whether applicant has provided signed documentation of settlement of damages of leasehold interests of state surface lessees, if any, or can demonstrate that such settlement is being negotiated;

5. Whether the easement applicant will grant the State of Montana a reciprocal easement to access lands managed by the Department, not necessarily limited to the state land section(s) and private land section(s) involved in the existing easement application;

6. Whether the applicant already has legal access to their property across private or public land:

   (a) In situations where the applicant has legal access to their property, applications for easements across trust lands are discouraged and will be presumed to be disadvantageous to the State. The applicant may overcome this presumption by clearly demonstrating either of the following through written documentation accompanying the application:

      (i) Impacts to state trust land are insignificant; or

      (ii) The construction and routing of alternative access across private property is impossible/impractical;

      (iii) They will acquire access to isolated state trust lands. The trust lands that may be benefited by access need not be within the immediate area of the applicant's easement request.

   (b) In situations where the applicant does not have legal access to their property and the property interest was acquired without legal access, applications are discouraged. The Department may consider applications if the applicant can demonstrate that the easement provides

a benefit to the trust (i.e. acquiring access to isolated tracts of trust lands that are of the same trust);

(c) In situations where the applicant does not have legal access, but the property was purchased with access that was subsequently lost, the applicant should attempt to purchase alternative access from neighboring land owners prior to submitting an application. In these situations, the Board may consider more favorably those applications that include written documentation of attempts to purchase access from all adjacent land owners;

7. The environmental impacts of the proposed easement, as demonstrated by the Department's Montana Environmental Policy Act [MEPA] analysis or other sources of information reflecting visual, social, historical or cumulative environmental impacts; and

8. Applications for "after-the-fact" easements for roads that were constructed or established in trespass after October 1, 1997 are not in the best interest of the trusts and the Department will recommend the Board deny these requests. Should the Board approve such an application, the applicant will be subject to costs above and beyond the valuation for the easement. These costs include administrative costs associated with the easement and trespass penalties as outlined in 77-1-125, MCA. The Board may also require the applicant to purchase access to isolated trust lands as part of the approval process.

9. All applications that provide access to an existing subdivision or planned subdivision must be made in the name of a Road User's Association. Said Road User's Association must be legally formed through the creation of Articles of Incorporation and By-Laws properly recorded in the appropriate county courthouse and through registration with the Secretary of State's office as an entity legally entitled to conduct business in the State of Montana. The Road User's Association is required to submit articles of incorporation upon its formation and annual financial reports to the Department as required by the Secretary of States office. The Association must remain in good standing with the Secretary of State's Office throughout the term of the easement. Failure to comply with these and other requirements stated in the easements may result in the cancellation, suspension, or termination of the easement(s). Private landowners that proceed to subdivide all or a portion of the private lands served by a state access road after an easement has been granted will be required to create a Road User's Association and assign any existing easement to the Association.

Easement Valuation

The method to determine the compensation due for access road easements is to be based on one hundred percent (100%) of the current fair market value of the state land the easement will encumber. Current fair market value is based on the highest and best use of the larger parcel as of the date of valuation. Whenever possible, the Department will make use of established fee schedules to determine easement compensation.

In some circumstances, the Department may also assess a charge for the value of established roads. Dependent upon the costs incurred by the Department to construct or reconstruct an existing road, an applicant can expect to pay a fee equivalent to their proportionate share in the use of the road.

Compensation for access road easements will be assessed dependent upon the width of the access road being applied for using one of the following two methods: 1) Appraisal for the entire width up to a maximum of 60 feet; 2) Appraisal for widths up to 30 feet wide and an additional rate of $1.00 per foot width for any width between 31 to 60 feet, multiplied by the number of rods within the length of the easement. In all cases, whichever method provides the most financial benefit to the state will be used.

Additionally, where there is reason to believe the remaining state land would suffer a loss in current fair market value due to the access road easement across the state land, a before and after appraisal must be conducted. Any diminution of current fair market value to the remaining land as a consequence of the easement encumbering the state land is an additional compensable item that is in addition to the compensation paid for the easement.

In the event an easement applicant wishes to acquire an access easement for subdivision purposes, as defined at the end of this policy, or for potential future development of more than one residential housing unit on the dominant tenement, an access conveyance fee shall be assessed. This fee, described below, is assessed separate from the land value established under the valuation methods described above. Following are the options available to applicants regarding the conveyance fees:

Except as noted below, the Board shall require the applicant to create a Road Users Association and payment of a conveyance fee. Upon initiation of the first sale of an existing tract of record, the subdivision of a tract of record or partial assignment of easement rights to a third party, applicant shall be responsible for the creation and management of the Road Users Association.

1. The conveyance fee is binding on applicant and shall be paid at the time of the first sale of an existing tract of record, the first sale of a new tract or tracts of record created by subdivision, or by partial assignment of

the easement rights to a third party. The conveyance fee will be collected at the time of closing for the first sale of a tract of record or partial assignment of easement rights or at the time of the grant of an easement in the case of a request for access to more than one residential housing unit.

The requirement to create a road user's association and pay the conveyance fee will not apply to assignments in whole since the new owner is considered the "successor" of the easement. The successor shall be bound to all provisions within the easement deed and this policy.

The current conveyance fees are:

- 1% of the sale price or market value as determined by the Department for lands sold.

2. **Reductions or Waiver of the Conveyance Fees** – On a case-by-case basis, the Land Board, at the recommendation of the Department, may elect to reduce or waive the conveyance fee:

    - If the property is subject to an existing conservation easement or other irrevocable density-limiting agreement that is acceptable to the Department.

    - If the net near-term financial gain or irrevocable loss prevented to the trust(s) is equal to or greater than the amount of the conveyance fee, the fee may be reduced or waived. Examples may include, but are not limited to the following:

        - where joint development of properties are proposed by both parties, or
        - where other existing or proposed real estate transactions are planned by the State within the next five years (i.e. – residential, commercial or industrial land development; land exchange; land banking; land sale; sale of conservation easement; etc.).

Final Review and Approval by the Board

When the Department and applicant have generated all information necessary for the Board's consideration, the information will be presented to the Board for review and

determination whether the proposal is advantageous to the state. It is the Board's duty to disapprove any application that, in its opinion, would be disadvantageous to the state.

Any easement that is granted will be restricted to the particular use(s) and corridor width applied for by the applicant. Any change or expansion of permitted use(s) and/or easement corridor without authorization from the Department subjects the easement to possible suspension or cancellation. A right-of-way grantee may submit an application for an amended easement if a need arises for expansion of use or additional width needed that was not contemplated by the original easement.

Access Uses Defined

It is the policy of the Board that the following purposes for which access easements are granted shall be construed as granting the described rights therein:

Private Access for Residential Purposes - Non Historic:

Any such easement properly applied for and granted by the Board shall allow access to the applicable number of residences or vacant residential lots as applied for, including all garages, sheds, barns or other associated outbuildings. Use of the road for other purposes, such as recreational purposes (e.g. hunting, fishing, outfitting), routine maintenance and property management (including the ability to clear and/or thin timber and other natural fuels to create defensible space) is also implied. The ability to travel upon the road across state land is extended to the applicant's invitees and guests, but only to the extent of allowing ingress and egress across state land for the purpose of accessing applicant's private lands. Use of any portion of the road on State land for any purpose other than ingress/egress as stated herein, including use in conjunction with recreational activities conducted on state land, is subject to the provisions of ARM 36.25.149 and authorization by the Department. Any unauthorized use of the road on State land by the applicant and/or their invitees and guests may result in mitigative actions being taken by the Department as deemed necessary. Maintenance for the road across state land will be the responsibility of the applicant proportionate to their share of the use of the road.

Private Access for Farm/Ranch, Timber Resource Management and Land Management Purposes - Non Historic:

An applicant may apply for an easement to access their private lands for the purposes of conducting normal farming and ranching operations, timber resource management and land management. Said use shall be consistent with practices relating to such uses, including movement of all equipment, machinery and livestock. Use of the road for other purposes, such as recreational purposes (e.g. hunting, fishing, outfitting[1]) and clearing and/or thinning

of timber or other natural fuels for fire hazard reduction purposes upon applicant's private land is also implied. The ability to travel upon the road across state land is extended to applicant's invitees and guests, but only to the extent of allowing ingress and egress across state land for the purpose of accessing applicant's private lands. Use of any portion of the road on State land for any purpose other than ingress/egress as stated herein, including use in conjunction with recreational activities conducted on state land, is subject to the provisions of ARM 36.25.149 and authorization by the Department. Any unauthorized use of the road on State land by the applicant and/or their invitees and guests may result in mitigative actions being taken by the Department as deemed necessary. Maintenance for the road across state land will be the responsibility of the applicant proportionate to their share of the use of the road.

Private Access Under Historic Right of Way Statute (77-1-130, MCA):

A person may apply for a historic access easement across state land to access their private lands so long as the road was in place prior to 1997 and historically provided access to applicant's private lands. Applicant may make application only for the use(s) that historically existed up to the year 1997. If the use of the private land has changed since 1997 (e.g. farm land in 1997, subdivided into residential development in 1998), applicant does not qualify for historic road easement. Easements may be granted for the purpose of accessing private lands for farm and ranch purposes, existing subdivisions and residential purposes, timber resource and land management. If granted by the State Board of Land Commissioners, the Department shall issue a permanent, perpetual easement to the applicant. Use of the road for other purposes, such as recreational purposes (e.g. hunting, fishing, outfitting[1]), routine maintenance and property management (including the ability to clear and/or thin timber to create defensible space or for fire hazard reduction purposes) upon applicant's private land is also implied. The ability to travel upon the road across state land is extended to applicant's invitees and guests, but only to the extent of allowing ingress and egress across state land for the purpose of accessing applicant's private lands. Use of any portion of the road on State land for any purpose other than ingress/egress as stated herein, including use in conjunction with recreational activities conducted on state land, is subject to the provisions of ARM 36.25.149 and authorization by the Department. Any unauthorized use of the road on State land by the applicant and/or their invitees and guests may result in mitigative actions being taken by the Department as deemed necessary. Maintenance for the road across state land will be the responsibility of the applicant proportionate to their share of the use of the road.

Recreational Use (Outfitting):

In Weitz v. DNRC the Supreme Court found that the recreational use statutes and rules were not intended to restrict or address lessee's use of their leased lands when not recreating nor was it intended to restrict their use of their adjacent private land. Furthermore, the Court found that the Legislature notably distinguished lessees of State lands as a separate

class from the public. The Court concluded that "application of the rule prohibiting vehicle travel across State lands when applied to a lessee traveling by existing roadways to conduct activity elsewhere is an overbroad and unlawful application of the regulations and is unenforceable.". In their summary statement the Court stated that traversing leased State lands in order to conduct outfitting on private lands of the lessee does not constitute outfitting on State land.

Based on this decision, the Department has determined that, in addition to lessees, the aforementioned use will also be applicable to legal holders of easements across State lands. DNRC authorizes outfitting on State Trust lands under a Special Recreational Use License for Outfitting (SRUL). If use of the road on State land will be in conjunction with recreational activities conducted under authorization of a SRUL, such use is subject to the terms and conditions in the SRUL and authorization shall be at the discretion of the Department's Area Managers, however, such authorization shall not be unreasonably withheld. Road use should be authorized under the following conditions:

1) Limited or no public conflict because public access to affected tracts is restricted by private ownership (Note: In compliance with current recreational use policy, if the tract is legally accessible and public use of the road is restricted/prohibited, use should not be authorized to individuals, including outfitters);
2) Road does not intersect or link any other public or designated roads in the area;
3) No imminent threat of adverse environmental impacts or resource damage;
4) Consistent with fiduciary responsibilities, just compensation is obtained for the right conveyed.

Assignments of Access Road Easements

Easements issued for access across state trust lands are assignable to other parties so long as the terms and conditions of the easement have been met and there are no outstanding issues in regards to reclamation, maintenance, weed control, etc. Such approval will not unreasonably be withheld. The party assuming the easement becomes obligated for performance of the terms and conditions of the easement. The assignment allows the assigned party to enjoy use of the road for the uses specified in the original easement grant and as designated above.

In accordance with the easement valuation paragraph above, assignments of easements providing access to existing subdivisions or new subdivisions will require the creation of a road user's association and assignment will only be approved to such an entity. Additional payment will be required prior to assignment approval for such designated subdivision or potential subdivision development lands.

Approved by the State Board of Land Commissioners and effective this 18th day of September, 2006.

Signed: _____
Mary Sexton, Director
Department of Natural Resources and Conservation

Definitions:

"Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes. §76-3-103(15), MCA

"Tract of record" means (a) an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office. (b) Each individual tract of record continues to be an individual parcel of land unless the owner of the parcel has joined it with other contiguous parcels by filing with the county clerk and recorder: §76-3-103(16), MCA