

MONTANA STATE LANDS AND THE MONTANA LAND BOARD

A Publication of Montana Conservation Voters Education Fund - Volume 5 - Number 2 - Fall 2006

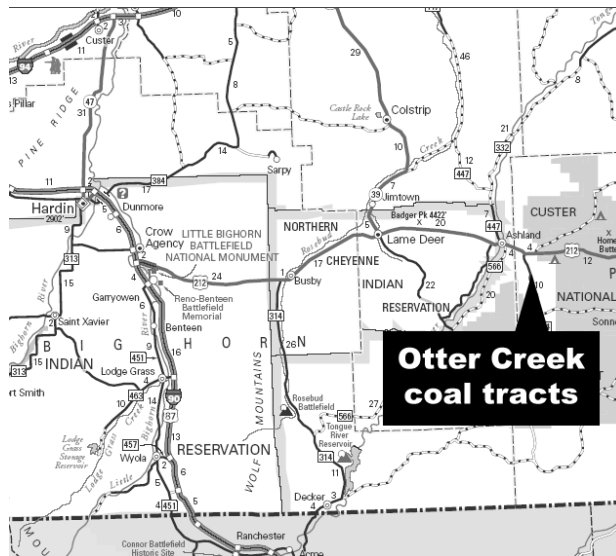
Otter Creek Coal – “Not ready to be developed”

The long, strange story of the Otter Creek Coal tracts got longer and stranger at the July 2006 meeting of the Land Board. The tracts, located on the east boundary of the Northern Cheyenne Reservation, were granted to the State of Montana by the federal government in the late 1990s as part of a settlement to buy out the proposed New World gold mine on the border of Yellowstone National Park. At the time, then-Governor Marc Racicot reasoned that developing the coal deposits in Montana would make up for jobs that were "lost" because the gold mine wouldn't go forward and took the coal instead of \$10 million offered by the feds. But nearly a decade later, the coal remains undeveloped for a number of significant reasons and, as Governor Schweitzer and the Land Board were told, it is likely to remain undeveloped for quite some time to come.

Although we have chronicled the Otter Creek saga in this publication for years, a quick review may prove useful. When the Otter Creek tracts were first accepted by the Racicot administration, Jim Mockler, the long-standing executive director of the Montana Coal Council, told the Land Board that "the state should have taken the money." Mockler then went on to add that the federal coal had "been there forever" and "if it was economical to develop it, it would have already been developed."

Undeterred by advice they didn't want to hear from the state's most pro-development representative of the coal industry, both the Racicot administration and that of his successor, Judy Martz, forged ahead in their attempts to develop Otter Creek. The 2003 legislature even went so far as to appropriate and spend \$300,000 of public money to perform initial studies on the tracts.

Faced with the prospect of massive coal development on its border, the Northern Cheyenne Tribe sued the state and eventually reached an agreement (see Focus on Montana State Lands, Summer 2002 and May 2005) in which cultural, social, environmental, educational, and hiring issues were addressed. In the meantime, ranchers were fighting the proposed Miles City to Otter Creek Tongue River Railroad to prevent it from transecting their ranches.



And then politics reared its ugly head when Secretary of State Brad Johnson, the lone Republican on the Land Board, called Governor Schweitzer's plans to build a coal-to-liquids plant a "pipe dream" at the Republican state convention in 2006 and chided him for failing to push development of the Otter Creek tracts.

Schweitzer struck back hard three days later at the June Land Board meeting with an hour-long presentation which had not been on the agenda, detailing the administration's efforts to develop Montana's coal resources and peppering Johnson with questions about what he thought the state should be doing.

At the July 2006 Land Board meeting, DNRC made another presentation of the administration's coal development efforts, this time with special emphasis on the Otter Creek Tracts. Significantly, Chuck Kerr, the president of Great Northern Properties (GNP), which owns the private land checkerboarded with the state land in the Otter Creek Tracts, gave a long presentation and cautioned the Land Board against rushing into leasing the coal properties until necessary infrastructure was in place.

Although he called the estimated 1.2 billion tons of Otter
(Otter Creek Coal continued on page 3)

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Our Mission

The Montana Conservation Voters Education Fund (MCVEF) is dedicated to building the capacity of Montana's conservation and environmental community to advance conservation issues within the state's democratic process. MCVEF seeks to build leadership and involvement in government, to preserve and enhance Montana's water, air, open spaces, and wildlife for future generations.

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Introduction

In this issue we bring our conservation readers some very good news. Thanks to a ferocious struggle by local ranchers against the Tongue River Railroad, a lawsuit by the Northern Cheyenne Tribe against the state, and the high sodium content of Otter Creek coal, it looks like it may well be some time before any harmful development takes place in the Otter Creek Tracts. Given the propensity of the energy industry to continue to use outmoded and highly-polluting thermal power plants, this is great news for the environment of southeast Montana.

Also in this issue we look at the Land Board's efforts to re-authorize the fledgling and controversial land banking program. While some progress is being made, it is fair to say the significant difference in land values between eastern and western Montana these days is making the program's goal of selling off isolated tracts and purchasing publicly-accessible lands a lot tougher than originally thought. And with real estate values skyrocketing on a weekly basis, there are some significant concerns that rushing to sell off state lands may not be the most prudent thing to do.

A couple of new access policies for state lands are also on the burner. Of particular interest is a move by the Board to obtain reciprocal access for the public whenever private access is granted across state lands. The info on where to find the new proposals is included in this issue and those readers who value public access to public lands may just want to contact their Land Board members to weigh in on the issue.

Meanwhile, the long-simmering debate over the use of trust land revenues to fund the Trust Land Management Division has been looked at closely by the Legislature's Environmental Quality Council, which has released a report on the issue. Using trust revenues for funding is also currently being investigated by the Legislative Audit Division, which will issue its findings soon.

And of course with the 2007 Legislative Session coming quickly, those interested in the future of Montana's 5.2 million acres of state trust lands will want to keep a close eye on the proposals that are popping up from all corners of the state.

Enjoy the newsletter and don't hesitate to crank out a letter or email to the Land Board to voice your opinion on the issues. And remember, the future of these public lands depends on you. THANKS again!

Focus on Montana State Lands and the Montana Land Board:

Researched and written by George Ochenski. Edited by Jeanne-Marie Souvigny

(Otter Creek Coal continued from page 1)

Creek coal "a wonderful resource," Kerr said because of its high sodium content it was not suitable for use in today's thermal generation plants -- but would be suitable for coal gasification or coal-to-liquids. Kerr estimated the current high-sodium coal market at only 20 million tons per year compared to the 400 million tons per year mined for coal-burning plants. Likewise, until a railroad, transmission lines, and/or pipelines were built to the tracts, Kerr felt that both the state and GNP would receive far less than the coal was actually worth and perhaps even face the prospect of the leases being purchased by Wyoming coal producers who would simply sit on them to eliminate any competition from Montana coal. Kerr estimated the time frame for getting the necessary infrastructure in place would probably be 6-8 years and take \$600-700 million.

In a surprising bit of news, state representative Jim Keane (D-Butte), gave a presentation and told the Land Board discussions were underway to build a much shorter rail

line that would access the tracts from the south. As a union representative of the Operating Engineers, Keane said they have always opposed the Tongue River Railroad and still do because all it would accomplish would be allowing Wyoming coal to be shipped up to the northern tier — which Keane said would cost Montana 200 coal miner jobs in the first year alone. Keane estimated a 41-mile railroad could be built for \$73.5 million to move the Otter Creek coal down to the existing Decker-area mines and generators where it could access Midwest markets, be blended with other coal, or used for gasification or liquifaction.

In the end, it was clear that not much is likely to happen with the Otter Creek coal tracts in the near future. As GNP's president Chuck Kerr noted when he testified before the Board: "Otter Creek is obviously a remote area...a geographically sensitive area...an extremely rugged area...a pristine area" – which are all good reasons for conservationists to be happy that development of this low-grade coal is not imminent.

Breaking News: Tongue River Railroad Executive Under Investigation by State and FBI

As we went to press, statewide news reported that Pat Davison, formerly with Wesco Resources, the company seeking to develop both the Tongue River Railroad and the Otter Creek coal tracts, has been charged with securities fraud by the State Auditor's Office, and is being sued by former clients who allege he bilked them out of their million-dollar retirement fund.

Davison, a high-profile Billings Republican activist, former gubernatorial candidate, and the campaign finance chair

for Sen. Conrad Burns' re-election campaign, is under investigation by the FBI. He resigned his position with the Burns campaign on July 27th. Furthermore, according to news reports that quoted Chief Executive Mike Gustafson of Wesco Resources: "Our business has separated itself from Pat Davison and we have removed him from any management responsibilities and any involvement in our projects." Davison also led former Governor Marc Racicot's campaign finance efforts.

EQC's Trust Land Management Study

The century-old question of how to pay for trust land management, which has cost more than \$88 million since the trusts were established, may be heading toward legislative resolution. Over the years, the Department of Natural Resources and Conservation's (DNRC) Trust Land Management Division has been funded by siphoning off a slice of the revenues the lands produce. But critics of this funding method, including the Montana University System, say such an approach violates the requirements of Montana's Constitution as well as the federal laws that granted the trusts. The legislature's Environmental Quality Council (EQC) addressed the issue in an extensive interim study and has

drafted two bills to clarify the funding mechanisms for consideration by the 2007 Legislature.

The long and complex story begins with the original Enabling Act that allowed North Dakota, South Dakota, Washington, and Montana to join the Union in 1889. One of the provisions of that Act set aside sections 16 and 36 in every township across the state for the purposes of supporting educational institutions in the newly formed states. Significantly, specific lands were dedicated for specific educational beneficiaries, which resulted in the 10 trusts now

managed by DNRC. Generally speaking, the Enabling Act details provisions for lands and the revenue they produce which are held in trust for the “common schools,” while the Morrill Acts (of 1862 and 1890) provide similar provisions for lands held in trust for the University System.

The legal opinions regarding the trusts go back almost as far as the Acts which granted them. In 1912, the U.S. Secretary of the Interior sent a legal opinion to the Montana Board of Land Commissioners that read: “...it is clear that the use of any portion of the principal or income derived from the lands or funds set aside and appropriated by the acts of Congress mentioned for the endowment and support of agricultural colleges in payment of administration expenses is a violation of law.” The Secretary required the state to “cease the use of the moneys in question” and “replace moneys heretofore taken...” In response, the Montana Legislature appropriated \$19,372.34 to reimburse the “Agricultural College” (MSU) for the fiscal years 1897 to 1912.”

In 1967, Montana Attorney General Forrest Anderson issued his Opinion that Montana had the right to reimbursement for all charges and expenses necessarily incurred in the execution of the trust “where no provision exists to the contrary in the grants creating the trusts.” In 1994, however, Greg Petesch, the Montana legislature’s chief legal counsel, wrote an in-depth review and advised the legislature of specific concerns with violating both the Enabling Act and Article X, section 5 of the Montana Constitution by using trust revenues to fund administrative costs. Petesch’s concerns were echoed in a Memo to the Board of Regents by then-chief legal counsel LeRoy Schramm in 2004, in

which he estimated the state could owe the University System between \$11 and \$14 million in restitution.

Finally, in a case of dueling Attorneys General, Washington’s AG issued a legal opinion in 1996 that says that state is “precluded from charging the expense of managing and administering Section 16 lands against proceeds of the sale of the lands” and, significantly, that “proceeds from the sale of the lands include proceeds from the sale of resources that are part of the lands.” Last year, Montana’s Attorney General, Mike McGrath, sent a “letter of counsel” to Governor Brian Schweitzer saying the deduction of revenue for administering the trust lands does not violate the Montana Constitution and re-affirming Anderson’s legal opinion.

While the draft EQC study and legislative recommendations will be finalized at the September meeting of the EQC, so far it looks like two bills will be submitted to the legislature. The proposed Morrill Act Bill makes the statutory changes necessary to remove administrative cost deductions from those lands granted by the Morrill Act. The proposed Account Combo Bill allows the Board of Regents to determine the use of revenues generated from timber proceeds on University System trust lands and includes a number of other changes to trust land management, administration, and revenue distribution.

For those wishing to explore the history of Montana’s trust lands, their management and costs in more detail, and to see the proposed bill drafts, the EQC study is available online at <http://leg.state.mt.us/content/publications/lepo/2007trustlandadmin.pdf>. If approved by the EQC, the bill drafts will be available online at: [http://laws.leg.state.mt.us/pls/laws07/law0203w\\$.startup](http://laws.leg.state.mt.us/pls/laws07/law0203w$.startup).

Land Banking: Can It Work?

In August, the Land Board unanimously approved both reauthorization of the state’s land banking program and legislative changes the Department of Natural Resources and Conservation (DNRC) says will make the program operate more efficiently. Also at its August meeting, the Board gave its approval to DNRC to move forward on a couple of land sales and an acquisition under the program. But faced with enormous disparities in the current land values in eastern Montana and western Montana, questions regarding the value of the program, its costs, and its ability to work in the public’s benefit are likely to dog the efforts to reauthorize the controversial program.

Land banking was authorized by the 2003 Legislature under HB 223 and, as a “pilot program,” was given a sunset date of 2008, at which time the program will end. by which the program would end, of 2008. In its purest form, the intent is to allow the state to offload trust lands that are wholly or partially surrounded by private lands and use the revenues from the sales to purchase other lands that can be added to existing state holdings to produce more manageable, publicly-accessible blocks of land.

Since the program allows the state to sell state trust lands and buy other lands, it is fair to say there were many who

(Can it work? continued from page 4)

worried the state would rush to raise money by selling land and then find itself unable or unwilling to purchase replacement lands. During debate, those concerns led the legislature to limit the number of acres that could be sold to a total of 100,000 acres and to require that 75 percent of the acreage sold “must be isolated parcels that do not have a legal right of access by the public.” A further limitation requires that the state not sell more than 20,000 acres “unless the board has acted to use the revenue from that land to make purchases” of other lands.

In seeking Board approval for the reauthorization of the land banking program, DNRC’s director, Mary Sexton, said the program has nominated 118,038 acres for sale, of which so far 26,145 acres have received approval to continue through the sale process. Total revenue expected to be generated by the sales is estimated by DNRC at \$10,700,000.

State Auditor John Morrison moved to extend the sunset date by two years beyond the 2011 date suggested by DNRC to 2013, saying “a 5-year period is more conducive to predictable and long-range planning for acquisitions and dispositions. I’m concerned that three years might interfere with some of that planning.” Morrison then asked Director Sexton for her opinion and she explained that “it took 2-3 years to develop [administrative] rules and get the first go-around up and running” but that the department has experienced some of the glitches, suggested changes to make them better, and had no opinion on extending the sunset date. Morrison said his office had “sent letters to 43 conservation groups asking if there were any problems” with the program and received “no negative responses and one positive one.”

Attorney General Mike McGrath then jumped in and suggested that, given the controversial nature of the program, keeping the 2011 date was probably the right thing to do. “The program is up and running now,” said McGrath, “and won’t take the lead time it took to get where we are. But we have to be extremely cautious about the entire program when we’re talking about the sale of public lands. We have



Photo courtesy of DNRC.

DNRC land sale parcel #201 in Carbon County.

to do it right. I’m a strong believer in what it can do, but am nervous about its long-term potential.”

Morrison withdrew his motion to extend the sunset date and the Board voted unanimously to approve the draft legislation to reauthorize the program. Besides extending the sunset date, the draft reauthorization bill includes provisions to require bid deposits 20 days prior to the auctions instead of 45 days; lower the bid deposit bond to 20% from 50%; allow lessees to cancel sales within 10 days prior to the auction (instead of 30); and require that lessees who initiate sales proceedings pay the costs incurred by DNRC for the preparation of the sale including “appraisals, cultural surveys, environmental reviews and land surveys” within 10 days after preliminary approval of the sale by the Board. If the parcel is sold to someone besides the lessee who initiated the sale proceedings, those expenses will be remitted to the lessee upon the sale of the lands and the winning bidder will pay them instead.

Sales and acquisitions

One of the most significant problems faced by the land banking program is the notoriously low price for primarily agricultural lands in Eastern Montana compared to the skyrocketing land values for recreation and development in the western half of the state.

As an example, the Board gave preliminary approval for DNRC to purchase 40 acres next to Lone Pine State Park near Kalispell. The cost is estimated to be \$550,000 – or \$13,750 per acre. Meanwhile, in Garfield County on the eastern side of the state, an



Photo courtesy of DNRC.

The Land Board - (from left) Brad Johnson, Mike McGrath, Brian Schweitzer, John Morrison and Linda McCulloch

(Can it work? continued on page 6)

(Can it work? continued from page 5)

entire section of state land, which equals one square mile or 640 acres, is for sale at the minimum bid price of \$70,400 – or just about what 5 acres in Kalispell costs!

As the old saying goes, “they’re not making any more land” and the huge disparity in land values soon brings into question the long-term wisdom and actual benefit to the trust from selling off so-called “low-value land” en masse to purchase such small parcels of high-value lands. Undoubtedly many such questions will be raised during the legislative effort to reauthorize the controversial land banking program — and the outcome remains far from certain.



*Photo courtesy of DNRC.
Carbon County land parcel up for sale by DNRC*

Coming Attractions

Financial and Compliance Audit

In mid-November, the Legislative Auditor’s office will be releasing a Financial and Compliance Audit of the Department of Natural Resources and Conservation (DNRC). A close look at how the Trust Land Management Division of DNRC handles its finances and whether or not it is in compliance with both standard accounting practices and the statutes under which the division operates is to be included in the audit.

As we have reported previously (*Focus on Montana State Lands December 2005 and December 2004*), the practice of siphoning off trust land revenues for operations of the division has been and remains controversial. Moreover, questions abound as to how the division determines which trusts – or which beneficiaries – on which to spend its time and resources.

Legislative audits are not released until approved by the Legislative Audit Committee, so the audit will not be available until the November meeting. However, once approved, interested readers can access the audit report online at <http://leg.state.mt.us/css/audit/audivsn.asp>

Access Road Easement and Reciprocal Access and Easement Exchange Policies

Originally on the agenda for the August Land Board meeting, the development of both an Access Road Easement

Policy and a Reciprocal Access and Easement Exchange Policy for trust lands were canceled and moved to the September meeting.

The Land Board routinely grants a dozen or more rights of way (ROWs) to various entities for a host of purposes at every Land Board meeting. These ROWs vary widely from utility corridors to private access roads, and recently the Land Board had requested that the state develop a consistent policy to deal with access and easement issues. One of the Board’s stated goals is to make sure that the public acquires access to public lands – or does not lose existing access – whenever an easement or access is granted to private entities.

In the case of access where a road crosses both private ground and state trust lands, the Board has sought to create a Reciprocal Access and Easement Exchange Policy which would basically ensure that if the state grants private parties access across state lands for their purposes, the public will be granted similar rights (access exchange) across the private lands to access state lands.

The draft reciprocal access/easement exchange policy is available online at http://dnrc.mt.gov/trust/REMB/statues/Recip_Exchange%20procedures.pdf.

The draft Access Road Easement Policy is available online at <http://dnrc.mt.gov/trust/REMB/statues/drivewaystatue.asp>

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Your Voice Counts

As the 2007 legislative session nears, a host of bills dealing with state trust lands and their management are being drafted. In our next publication, which will come out in December, we will bring you an overview of pending trust lands legislation as well as information about where interested readers can obtain the bills and read them in full, how to track them through the legislative process, and how to submit testimony or comments to legislative committees. Your voice is important in ensuring sound policies for the management of Montana's 5.2 million acres of trust lands and our handy legislative guide will help you make a difference.

Land Board Schedule

October 16, 2006

November 20, 2006

December 18, 2006

The Land Board meets at 9 a.m. in Room 303 of the State Capitol Building in Helena. Meetings are open to the public, and are scheduled for the third Monday of each month. Copies of agendas are available on the Montana Land Board web page at <http://www.dnrc.state.mt.us/landboard.html>.

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IN THIS ISSUE:

- **Otter Creek Coal – “Not ready to be developed”**
- **Tongue River Railroad Executive Under Investigation by State and FBI**
- **EQC's Trust Land Management Study**
- **Land Banking: Can It Work?**

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