

MONTANA PURCHASE AND SALE ISSUES FOR BUYERS



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Colorado is high, having more peaks within its borders than any other state. Wyoming is wide, with the breadth of the plains between the Bighorns and the Grand Tetons. California is handsome, with a splendor of success. It takes all three adjectives to describe Montana.

—*The Road of a Naturalist*, Donald Curloss Peattie

That observation helps explain why Montanans are among the happiest in the nation and possess a high sense of well-being.¹ The state's geographic traits shape an economy where bountiful agricultural production and rich natural resource development cohabitate with the abundance of scenic splendor—but wheat, beef, coal, oil, timber, hydropower, fishing and hiking do not tell the entire story. As a home to first-rate healthcare and a national leader in start-ups per capita and manufacturing growth, these newer economic sectors complement the predominant agriculture, natural resource development and tourism industries, traditional economic mainstays that predate statehood in 1889.² These real estate-driven industries influence how and why we use, buy, sell, lease, develop, restrict, encumber, and recreate on real estate and in turn impact real estate acquisitions.

LOCAL PRACTICE

When undertaking a real estate transaction, a general understanding of local practice is helpful. The juxtaposition between Montana's small population (approximately 1 million) and large geography (fourth largest state) presents a challenge for local attorneys wanting to focus on a narrow legal subspecialty and forces

them to hone a broad skill set throughout a primary practice area. An effective local real estate practitioner has strong substantive knowledge in sales and acquisitions, leasing, development, finance, and entity formation. In a transaction, it is common to encounter both unrepresented parties and attorneys with limited real estate experience. These situations require a deft approach. For example, it is rare for parties to consummate a residential real estate transaction with an attorney. That legal landscape contributes to the local real estate form practice, or lack thereof.

FORM PRACTICE

Montana has no statutory or standard form of deed. Also absent is a standard or customary form of purchase and sale agreement, except for the copyrighted Montana Association of Realtors Forms, which parties typically use when they do not engage real estate counsel (or sign before doing so). Those forms are nearly universal in residential real estate transactions and common in commercial real estate transactions. Attorneys rarely use them, but if doing so is unavoidable, significant revisions are necessary. A common and ill-advised practice is using those real estate forms in commercial transactions, which typically implicate areas beyond just the real estate component. In these instances, the form users either ignore those other areas or attempt to address them by inadequately populating the "fill in the blank" portions of the form or tacking on poorly crafted addendums.

This article provides guidance on how to draft real estate transaction documents from the buyer's perspective that comply with local law and avoid roadblocks that arise due to a lack of standard forms and when parties are un- or underrepresented. Regarding the documents, a typical refrain from clients, adverse parties, opposing counsel, realtors, bankers and others

is “[T]his is Montana, not [insert name of large metropolitan area], we do not need a [insert arbitrary number greater than 10] page agreement.” There is a balance between the brevity of a bar-napkin deal and the overkill of a bloated agreement. Failing to find this fine balance has and will continue to break many transactions, but drafting thoughtfully with the liberal use of explanatory footnotes can be helpful.

DRAFTING

Thoughtful contract drafting begins with overcoming dysfunctional traditional drafting and involves eliminating archaisms, legalistic prose, redundancies and overlong sentences resulting from mindlessly revising and cutting and pasting from precedent contracts.³ That requires surmounting the flimsy conventional wisdom that traditional contract language works and is tested. Committing those traditional drafting sins is not foreign to this author, who found redemption in *A Manual of Style for Contract Drafting*, Fourth Edition by Kenneth A. Adams. The benefits of clear and concise drafting abound, one of which is avoiding the need to resort to Montana’s statutory Maximums of Jurisprudence, which contain the interpretation rules from the archaic Field Civil Code.⁴

FIELD CIVIL CODE

In Montana, the traditional common law areas of contracts, sales and property law are statutory. This is due to a codification movement dating to the 19th century led by New York attorney David Dudley Field. Field sought to reduce the then-existing body of private law to statutory form under his 1865 Field Civil Code.⁵ Ironically, New York largely rejected the Field Civil Code, but it found acceptance in young Western states with no common law of their own—California, the Dakotas, and in 1895, Montana. We generally allow the law to develop through common law, but the intent of the Field Civil Code was to displace that process. The states that adopted both the Field Civil Code and the common law created an inherent clash of uncertainty and judicial usurpation. California made major amendments to the Field Civil Code to fix that problem, while Montana made few. To balance the oxymoronic practice of using fluid common law with statutorily frozen common law from an earlier historical era, the Montana courts deploy a combination of tactics, including:

- Ignoring the statute;

- Taking statutory language out of context; and
- Using tortured statutory interpretations to reach a result.

Montana’s citizen legislature meets only once every two years for a 90-day session, making it doubtful that repealing or amending the Field Civil Code will ever be high on the legislative agenda. On the bright side, Montana adopted the Uniform Commercial Code with few changes, the most frustrating of which is using a different numbering scheme for Article 9 than the Uniform Act.

Field Civil Code-Related Practice Tip

Although it is not intuitive, know that the laws of contracts, sales, and property are statutory. Reviewing the statutes alone is insufficient because the common law may contravene the statutory language.

MONTANA CONSTITUTION

Aside from the Field Civil Code, Montana’s Constitution has distinct features that relate to local real estate law. The Montana Constitution gives present and future generations the inalienable right to a clean and healthful environment.⁶ This protection is anticipatory and preventive, making it unnecessary to wait “until dead fish float” to invoke it.⁷ It affects all stages of a real estate project’s life cycle, not just the remediation phase at the end, so anticipating potential issues and addressing them proactively is important. Another unique feature of the Montana Constitution is its provision that the state owns all of Montana’s water on behalf of the citizens.⁸ As this article explains in the Water Rights section below, water rights holders do not own the water itself, but may use it for a beneficial use.⁹ Yet another provision requires the legislature to provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic, scientific, cultural, and recreational areas, sites, records and objects for their use and enjoyment by the people.¹⁰ As this article discusses below, that obligation coupled with that of a clean and healthful environment, led to the enactment of Montana’s Open-Space and Voluntary Conservation Easement Act.¹¹

REAL ESTATE TAXES

Montana has no sales tax, nor any mortgage, transfer, or documentary taxes. That may help explain why

Montana has the sixth best business tax climate in the country.¹² Subject to some exceptions, all real property is subject to taxation by both the state and its counties, municipalities, and other political subdivisions to finance various general and special governmental functions. The state classifies property according to its use and character, and then taxes the different classes of property at different percentages of their market valuation (i.e., an ad valorem tax). The property taxes are payable in arrears in two installments that become due on November 30 and May 31.

Real Estate Taxes-Related Practice Tips

In the purchase and sale agreement, state that the parties will prorate the property taxes. Although the apportionment of taxes is negotiable, the parties typically want to pay the property taxes attributable to the property for the time in which they own it, prorating the property taxes as of the closing date. The closing agent will prepare the proration figures for the parties and because property owners pay property taxes in arrears, this should cause a seller credit on the closing statement. The parties customarily include a deed exception for real estate taxes for the current and later years. The purchase and sale agreement should have representations from the seller that:

- There are no taxes or assessments affecting the real estate not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real estate; and
- The seller is not aware of any proceedings contemplated or commenced by any governmental or taxing authority that could cause any taxes or assessments affecting the real estate.

AUTHORITY TO TRANSACT BUSINESS

Unless an exemption applies, a foreign entity may not transact business in Montana until it obtains a certificate of authority from the Montana Secretary of State.¹³ No exemption applies to real estate ownership, but there are exemptions for matters such as holding mortgages and security interests in real or personal property or maintaining bank accounts. Failing to obtain a certificate of authority does not impair the validity of contracts that the entity enters, but it cannot commence a legal action in a Montana court until it obtains a certificate of authority. Each municipality has its own business license requirements and some

require entities conducting business in the municipality to obtain one.

REAL ESTATE OWNERSHIP

Generally, there are no statutory limits on who may own real estate. A single person or several persons can own property. Ownership by a single person is sole or several ownership, while ownership by several persons (i.e., concurrent estates) are:

- Joint tenancy (joint interests, presumptively owned in equal shares but ownership need not be equal);
- Tenancy in partnership (partnership interests owned in partnership for partnership purposes); and
- Tenancy in common (interests in common, which are those not owned in joint ownership or partnership).¹⁴

To create a joint tenancy, the parties must do so in a single transfer and declare the transfer to be a joint tenancy in the transfer instrument (i.e., deed), otherwise the transfer creates a tenancy in common.¹⁵ Joint tenancies include the right of survivorship of each joint tenant, so when a joint tenant dies the surviving joint tenants equally succeed to the decedent's share without the need to probate because the interest in the property transfers automatically upon death.¹⁶ There is no tenancy by the entirety in Montana (i.e., a form of ownership by husband and wife whereby each owns the entire property and if one dies, the survivor owns the property without probate). On a separate but related note, Montana is not a community property state.

REAL ESTATE TRANSFERS

- A real property transfer must:
- Be in writing;
- Be subscribed (signed) by the party making the transfer;
- Identify the transferor and the transferee;
- State the transferee's address;
- Contain an adequate property description; and
- Contain language of conveyance.¹⁷

Subject to some exceptions, transfers of personal property are likewise subject to the statute of frauds.¹⁸ The customary instrument of transfer is a deed, which is an agreement that most often flows from obligations parties have to one another under a purchase and sale agreement.¹⁹ Montana has a short-form of statutory grant that nobody uses (essentially creating what we commonly call a "grant deed" or "limited warranty deed") and has no statutory or standard form of warranty deed, limited warranty deed or quitclaim deed, nor do the statutes define or use those terms.²⁰ In a written transfer of real estate (i.e., a deed), the terms "transfer," "grant," "conveyance" and "bill of sale" are synonymous, but the term "grant" has a special connotation.²¹ By using the word "grant," the parties create a limited warranty deed (a.k.a., a "grant deed") and the grantor makes these implied covenants:

- The grantor has not conveyed the property to anyone other than the grantee; and
- The property is free from encumbrances, including taxes, assessments and liens, created by the grantor or anyone claiming under the grantor.²²

To make a deed into what we commonly call a warranty deed, the grantor must make it with the usual covenants. Under the rubric of stating in the purchase and sale agreement that the seller will transfer the real property with the usual covenants, the seller must make these five common law covenants of title in the deed:

- Seisin (scarcely distinguishable from the common law covenant for title of the right to convey);
- Against encumbrances;
- Quiet enjoyment;
- Further assurances; and
- General warranty.²³

In lieu of making those covenants in the deed using the archaic statutory language, it is customary to instead state "the grantor provides this warranty deed with the usual covenants expressed in Montana Code Annotated § 30-11-110" or similar language. Easements and water rights pass with the transfer, as do mineral rights, except for mineral rights reserved in the transfer or an earlier transfer.²⁴

Deed-Related Practice Tips

Joint Tenancy

To create a joint tenancy, state in the deed that "the grantor hereby transfers the real property described below to [insert joint tenant] and [insert other joint tenant], as joint tenants [with right of survivorship and not as tenants in common]." The "with right of survivorship and not as tenants in common" language is superfluous, but many lawyers include it.

Deed Language

In a quitclaim deed, use "the grantor hereby quitclaims to the grantee the real property described . . ." The word quitclaim is important because it helps avoid the passage of after-acquired title, and if one instead uses the word grant, the grantor unintentionally makes the implied covenants. In a limited warranty deed (a.k.a. grant deed), use "the grantor hereby grants . . .", but be sure the instrument does not state or reference the usual covenants. In a warranty deed, use "the grantor hereby grants . . ." and after listing the deed exceptions, state "except with reference to the exceptions listed above, the grantor provides this warranty deed with the usual covenants expressed in Montana Code Annotated § 30-11-110," or something similar. Some attorneys attempt to list all of the general and special exceptions from the title commitment as deed exceptions, which is inappropriate. The standard deed exceptions are:

- Reservations and exceptions in patents from the United States or the state of Montana;
- Existing easements and rights of way;
- Building, use, zoning, sanitary and environmental restrictions; and
- Taxes and assessments for the current and subsequent years.

The parties may add exceptions case-by-case for other title matters that do not fit within those broad standard exceptions.

Legal Description

The legal description in the deed must be:

- A description based on the government sectional survey;

- A metes and bounds description based on a survey;
- A specific reference to a lot on a plat map recorded in connection with an approved subdivision; or
- A reference to an earlier recorded deed describing the exact same real property.²⁵

If the metes and bounds description is from a survey, it is better to refer to the survey and avoid the common problem of transcription errors in metes and bounds descriptions.

Realty Transfer Certificate

Montana's Realty Transfer Act requires that parties transferring real property complete the Montana Department of Revenue's confidential Realty Transfer Certificate and file it with the county clerk and recorder when recording the deed. Because a purpose of the Realty Transfer Certificate is to obtain sales price data to determine real estate assessment levels and uniformity, the parties must disclose the consideration paid for the real estate on the Realty Transfer Certificate, unless a listed exception applies (including transfers between husband/wife or parent/child for nominal consideration, termination of joint tenancy by death, gift, as well as the merger, consolidation or reorganization of a business entity). Another component of the Realty Transfer Certificate includes the required water rights disclosure, which this article addresses in the Water Rights section below. Those forms are easily accessible online and include comprehensive instructions.

RECORDING REQUIREMENTS

Montana has a race-notice recording act for real property transfers and parties record documents with the county clerk of the county where the real property is located.²⁶ A deed is valid between the transferor and transferee upon delivery, but unless someone records the deed, it does not protect the transferee against third parties.²⁷ To provide notice of a mortgage to third parties, the lender must record it and any assignments in the real estate records of the county where the real property collateral is located.²⁸ Montana has document recording standards addressing paper size and weight, margin size, listing the name and address of the party to whom the clerk and recorder should return the document after recording, and ink color.²⁹

Recording-Related Practice Tip

Parties may record documents without complying with the recording standards, but the recording fee increases.³⁰ Attention to detail is important because unlike other states, Montana does not have a general curative statute that allows parties to overlook defects once they record the deed, so defects such as an improper acknowledgment could render recording a deed ineffective under certain circumstances.

ZONING

An efficient way to ascertain the zoning classification of real estate is online through the local government website, usually either the municipal website for city zoning or the county website for county zoning. With the zoning classification in hand, the next step (on the same website) is to read the municipal code or county ordinance that describes the uses permitted under that zoning classification. When acquiring real estate, the purchaser may want to obtain a zoning endorsement to the title policy, which states the zoning classification and the uses permitted by that zoning classification. Some local governments will issue a zoning certificate stating the zoning classification and the uses permitted by that zoning classification, but that practice is not uniform.

PURCHASE AND SALE AGREEMENT

Courtesy of the Field Civil Code, we have a definition of what a contract is, and the definition of a sale agreement.³¹ But, neither is useful. Although the purchase and sale agreement almost invariably addresses the deed, there are scenarios where the statute requiring the seller to execute a conveyance sufficient to pass title to the property is helpful.³² Unless the parties provide otherwise, deeds can come with implied covenants and the UCC has implied warranties in the sale of goods. But, if a sales transaction falls outside of those realms, there are no implied warranties.³³ A benefit of not having customary or form purchase and sale agreements is that it can make the drafting and review process malleable. Because of that malleability, we need not focus on the host of typical purchase and sale agreement provisions and can instead analyze Montana-specific issues that may arise in a real estate acquisition.

Disclosures

The seller can avoid liability by making:

- These mandatory disclosures applicable to residential property (i) radon, (ii) smoke and carbon monoxide detectors, (iii) lead-based paint for houses built before 1978, and (iv) sexual and violent offenders (mandatory for brokers and salespersons);
- A mold disclosure applicable to the sale or lease of occupied property; and
- A mandatory noxious weed disclosure applicable to agricultural property.³⁴

Extra-Contractual Liability

Most attorneys treat the technical difference between representations and warranties with indifference and use them together (or interchangeably) to introduce statements of facts by the parties in the purchase and sale agreement. If a statement of fact is inaccurate, it is likely a misrepresentation and not a breach of a warranty. The purchase agreement typically dictates the remedies for a misrepresentation or a breach of warranty, but under these circumstances a seller can be liable regardless of the language in the agreement:

- If by its words or conduct the seller creates a false impression about serious impairments and then fails to disclose material facts;³⁵ or
- The seller breaches the implied covenant of good faith and fair dealing, which is a mutual promise implied in every contract that parties will deal with each other in good faith, and not attempt to deprive the other party of benefits of contract through dishonesty or abuse of discretion in performance.³⁶

Limitation on Liability

The purchase and sale agreement may impose a limitation on the seller's liability, but it is more common not to include one. If there is a limitation on liability, the parties should know that:

- They can limit liability by contract if they have equal bargaining power, but cannot omit it entirely by exculpating a party from liability for that party's own negligence, fraud, willful injury or violation of the law; and

- Montana has a statute preventing the parties from shortening the statute of limitations.³⁷

Liquidated Damages

Montana's statute on liquidated damages states that such clauses are prima facie void, permitting them only when damages are impractical or extremely difficult to prove.³⁸ As with several other Field Civil Code statutes, we must look to the common law to understand how liquidated damages work in Montana. It was easy to challenge liquidated damages provisions until the court adopted a test that inquires whether the liquidated damages clause is unconscionable.³⁹ Under that test and despite the statutory language, the court presumes liquidated damages to be enforceable unless they are unconscionable. All liquidated damages must be reasonable in the light of the anticipated or actual harm, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Exculpatory Clauses

An exculpatory clause is a term of art for a provision in a contract that exempts one from responsibility for their own negligence, fraud, willful injury or violation of the law. Montana has a statute broadly prohibiting them and the court considers that statute to be clear and unambiguous, ruling that an entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether rooted in statute or case law.⁴⁰ Despite that ruling, parties continue to incorporate illegal exculpatory clauses in their contracts. Even in jurisdictions that enforce exculpatory clauses, most will enforce them only if they exculpate a party from simple negligence. This means the oft-used higher degree of negligence—gross negligence—risks having the court throw out the exculpatory clause as overly broad. Severing those words could save the clause, so a severability provision might be helpful. The meaning of "negligence" is relatively consistent across U.S. jurisdictions.⁴¹ Conversely, "gross negligence" is a vague term of art with no settled meaning causing many jurisdictions not to recognize degrees of negligence.⁴²

Attorneys' Fees

Absent contractual agreement or specific statutory authority, each party pays its own attorneys' fees, even if the losing party caused the prevailing party

unnecessary expenses during litigation and discovery.⁴³ However, the court may use its equitable authority to award attorney fees absent statutory authority for a frivolous lawsuit.⁴⁴ If by contractual provision, one party may recover attorneys' fees, a Montana statute deems the provision as reciprocal to all other parties to the contract.⁴⁵

Remedies

If the buyer learns of a misrepresentation before closing, it typically has the option to elect one exclusive remedy:

- Terminating the purchase and sale agreement and receiving a refund of the earnest money;
- Forcing the seller to specifically perform the seller's obligations;⁴⁶ or
- Breach of contract. If the buyer learns of a post-closing misrepresentation, it will not have a remedy unless the representation survived the closing, but may have a breach of warranty claim if a warranty made in the deed (or bill of sale) is inaccurate.⁴⁷

Shifting back to the Field Civil Code, Montana has a statute requiring mutuality of remedy when a party seeks the specific performance of a contract, which appears to establish two hardline, interwoven rules:

- The availability of specific performance to one party automatically vests the other with the same right; and
- Courts may only award specific performance if the party requesting it has performed or may be specifically compelled to perform that party's obligations.⁴⁸

That statute is outdated, and the exceptions have gradually swallowed it in most jurisdictions.⁴⁹ The better rule adopted in other jurisdictions is for the court to enforce specific performance when it is equitable, regardless of whether both sides could request it, with the goal of the provision being to ensure that the party required to specifically perform will receive the agreed upon exchange.⁵⁰ Although Montana recognizes exceptions to the statute, and it appears the court wants to do what is equitable, the statute somewhat hinders this goal. There are specific performance situations that the court has yet to address and it is not

readily apparent how it will resolve them. As a final note on remedies, the following provisions are void:

- Entering judgment by confession against any party to the contract; or
- Empowering any person as the agent of any party to the contract to confess judgment, accept service of process, or consent on behalf of the party to the entry of the party's default in any proceeding in court upon the contract.⁵¹

In Montana real estate transactions, it is common to encounter a host of other significant issues specific to our region. Those include water rights, tribal real estate, mineral rights, grazing rights, fixtures, as-extracted collateral, timber and conservation easements. This article addresses each below.

WATER RIGHTS

Water rights are a blend of laws, regulations and traditions governing the distribution of water.⁵² Montana's Constitution provides that the state owns all of Montana's water on behalf of the citizens, so holders of a water rights do not own the water itself, but may instead use the water that the holder can beneficially use.⁵³ The prior appropriation doctrine guides water rights on a first-in-time, first-in-right basis. In dry years, the person with the first right has the first chance to use the available water to fulfill that right. Beneficial uses of water include these purposes: agricultural, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreation.⁵⁴ Water rights have a "use it or lose it" feature, and disuse can lead to abandonment. The Montana Water Use Act governs the administration of water rights and the three primary water rights-related processes:

- Adjudication;
- Permitting and changing water rights; and
- Enforcement.⁵⁵

Water Rights-Related Practice Tips

Transfer

When transferring real estate, the Realty Transfer Act requires the parties to complete the Montana Department of Revenue's Realty Transfer Certificate and file it with the county clerk and recorder when recording a deed.⁵⁶ A component of the Realty Transfer Certificate

incorporates the required water rights disclosure, which the parties can complete by performing a water rights search by owner or geocode on the Montana Department of Natural Resources and Conservation website. Water rights are appurtenant to the real estate and pass with the transfer, but the transferee must submit a Water Right Ownership Update form to the Department of Natural Resources and Conservation and pay the update fee to update the ownership of those water rights.⁵⁷

Particulars

Each water right has an associated statement of claim, abbreviated versions of which are available online, that describes flow rate, volume and acres irrigated.

Reservation

Review both the proposed deed and prior deeds, because the water rights pass with the transfer unless the water right holder exempts the water right from the conveyance. Severing the water right from the conveyance is an exemption from Montana's Subdivision and Platting Act.⁵⁸

Ditch Companies

If a water users' association, irrigation district or ditch company provides water to the property, the buyer will want to review the owner's records concerning the shares and contact the district or company to understand the share transfer process and ensure that the seller has paid the assessments.⁵⁹

TRIBAL REAL ESTATE

Montana has seven federally recognized Indian reservations, home to at least eleven tribal cultures. Indian reservations commonly comprise:

- Privately owned fee lands;
- Tribal lands, which the tribe owns or the United States owns in trust for the tribe, subject to federal restrictions on alienation or encumbrance; and
- Allotted lands, which are lands the United States owns in trust for individual Indian owners, or individual Indians own themselves, subject to federal restraints on alienation or encumbrance.

This fragmented ownership, along with the fact that federal law, not state law, governs tribal and allotted

lands, creates a host of atypical right-of-way, lending and business issues one rarely encounters outside of an Indian reservation.⁶⁰

MINERAL RIGHTS

A basic understanding of mineral rights is important. Generally, the real estate owner owns the surface estate and the mineral estate, and Montana is an ownership-in-place state regarding minerals.⁶¹ The surface estate gives the surface estate owner the right to occupy and use the real estate, whereas the mineral estate gives the mineral estate owner the right to explore for and extract minerals, including oil, gas and coal. A "split estate" is a term of art used to describe scenarios where there is a separation of surface and mineral ownership causing two or more parties to own separate rights in the same real estate. A transferor creates a split estate by severing the mineral estate from the surface estate by conveyance, reservation or exception and doing so is exempt from Montana's Subdivision and Platting Act.⁶² Split estates are common throughout the American West, and many landowners are unaware their real estate is subject to the mineral rights of others. Split estates come in two primary forms. On private lands, split estates commonly result from a prior owner's reservation of mineral interests or prior transfer of mineral rights to a third party. Such transfers or reservations occur in deeds, leases, royalty carve-outs, assignments, or other documentation throughout the chain of title.

While surface ownership is easily verifiable, determining mineral ownership necessitates deeper due diligence. Montana considers the mineral estate dominant over the surface estate, so once a mining project or oil and gas operation receives its permits, the rights of the mineral owner will likely take precedence over the surface owner's use of that land. Another form of split estate ownership is due to the federal government's retention of mineral rights during its transfer of real estate in Western states into private ownership through patents issued under congressional acts, such as the Stock-Raising Homestead Act of 1916. Some patents reserved mineral rights to the federal government resulting in lands being subject to:

- The location of mining claims by third parties; and
- The possibility of leases if the government grants leasehold rights to third parties.

Master title plats and federal patents from the Bureau of Land Management can reveal whether the federal government holds mineral rights to a particular piece of property. Montana has notification and surface damage statutes that afford surface estate owners with some protections.⁶³ Montana has yet to adopt the accommodation doctrine, which uses a test to weigh the inconvenience to the mineral owner or lessee of adopting an alternative to the proposed method of operation against the surface owner's right to use the surface so it does not unreasonably interfere with the mineral estate owner's right to develop the minerals use. Historically, Montana only looked only at whether the mineral owner acts reasonably under prevailing conditions or is negligent.⁶⁴

MINERAL RIGHTS-RELATED PRACTICE TIPS

Deed Reservation

In eastern Montana, many attorneys will include a reservation of mineral rights in the deed automatically to create a split estate. Unless the parties negotiated the mineral rights reservation and the buyer understands the impact, the buyer should insist upon removing the reservation.

Title Insurance

Title policies do not insure surface owners against possible mineral development (including oil, gas and coal), and except mineral ownership and mineral rights from coverage. Some title companies will run a mineral ownership report to determine who owns the mineral estate, but it comes with no guarantees. The buyer can request the carrier to remove the mineral exceptions. Some carriers may do so if the real estate is in an urban location where the possibility of natural resource development is remote, including due to zoning and other regulations. Some carriers may remove the mineral exceptions based on a title opinion from a reputable law firm with experienced title attorneys. Those opinions can be expensive and the insured will be responsible to pay the legal fees the title company incurs in procuring the opinion. If the title company will not remove the mineral exceptions, the owner can obtain a title opinion, which the issuing firm's malpractice insurance supports. Another way to understand the possibility of mineral development is to retain a landman, geologist, mining engineer or other mineral resource specialist. A final option is to explore purchasing the mineral estate or obtaining a waiver of surface rights from the owner of the mineral estate.

GRAZING RIGHTS

Whether one is a landlord or tenant, grazing rights are often a critical component of an agricultural operation. Grazing leases establish the terms under which the landlord allows a tenant to use land and the forage it provides to graze livestock. The lease should be in writing, and must be if the term is longer than one year.⁶⁵ Besides the typical provisions (e.g., insurance, indemnification, default, etc.), the lease should address:

- Whether the term is annual, seasonal or continuing;
- The legal description and acreage;
- The number and kind or class of livestock;
- The lease rate (e.g., market value approach, estimated income approach, alternative feed approach, etc.);
- Maintenance issues including weed control, seeding, fertilization and fencing; and
- Prohibitions (e.g., restrictions on the property's grazing capacity, hunting, fishing, logging, travel on established roads, etc.).

State and federal public lands play an important role in this realm. Through the Montana Department of Natural Resources and Conservation, Montana has over 10,000 active agricultural and grazing leases, and through the U.S. Department of the Interior Bureau of Land Management and the U.S. Forest Service, Department of Agriculture, the federal government administers over 20,000 grazing leases and permits, including many in Montana. Those government leases generally have 10-year terms and can enhance the value of an agricultural operation. Each has transfer procedures to accommodate sales and a well-defined mechanism for lenders to perfect a security interest in the lease.

State Grazing Districts⁶⁶

To address the unregulated settlement and use of the public domain and reform open range grazing practices, Congress passed the Taylor Grazing Act of 1934 and Montana passed the Montana Grass Conservation Act of 1939.⁶⁷ The Taylor Grazing Act reserved vast amounts of public lands from homestead settlement and allocated their use for livestock grazing based on preference rights, which are historic land uses attached to private grazing lands called "commensurate property." The Montana Grass Conservation Act gives those

who own or control private grazing land the ability to create State Cooperative Grazing Districts, which are membership based nonprofit cooperative associations. Grazing districts work with state and federal agencies to conserve, protect, restore, and ensure the proper use of Montana's grass, forage, and range resources. Montana has 26 grazing districts, which cooperatively administer forage on approximately 10 million acres of combined private, state and federal lands. The Grass Conservation Act gives grazing districts the power to lease or purchase grazing lands, develop and manage district lands, allocate grazing privileges, issue assessments and collect fees. Grazing district membership and governance are too broad to address here, but here are the main takeaways:

- Membership is based on preference rights and each animal unit month ("AUM") of preference is a share in the grazing district (commensurate to a share in a corporation);
- Unless the district's governance documents permit voluntary withdrawal, members of a grazing district cannot withdraw and membership continues so long as the district exists; and
- Preference rights transfer when control of commensurate property transfers if the transferee obtains a nonuse permit or pays the regular fees.⁶⁸

Grazing-Related Practice Tips

Addressing Grazing Leases

Determine if the real estate is subject to a grazing lease. If not, include a representation in the purchase and sale agreement to that effect. If yes, obtain a copy and include customary lease-related representations in the purchase and sale agreement. Obtaining an estoppel certificate is a bonus, as grazing leases are typically devoid of that language and tenants in that setting are often hesitant to provide one. For government grazing leases, the assignment application process supplants the function of any assignment and assumption agreement and/or estoppel certificate.

Addressing Grazing District

The grazing district files a map with the county clerk and recorder.⁶⁹ That map reveals whether the real estate is part of the district. If it is, obtain copies of the district articles and bylaws and follow the governance procedures so that the preference rights of the

commensurate property transfer and then pay the grazing fee or secure a nonuse permit.⁷⁰

FIXTURES, AS-EXTRACTED COLLATERAL, AND TIMBER

Fixtures are familiar, but in Montana one regularly encounters timber to be cut and as-extracted collateral, which are somewhat akin to fixtures. As-extracted collateral comprises substances such as oil, gas or other minerals. There are three ways to perfect a security interest in fixtures, timber to be cut and as-extracted collateral:

- Filing a financing statement in the central filing office of the state where the debtor is located (this is problematic with fixtures because a party that perfects a security interest in the same collateral by making a fixture filing has priority and presumably creates the same issue regarding timber to be cut and as-extracted collateral);⁷¹
- Filing a fixture filing, timber to be cut filing or as-extracted collateral filing in the in the real estate records of the county where the real property is located that includes the requisite information (this approach may be problematic for fixtures because of a non-uniform provision in Montana's UCC);⁷² or
- Recording a mortgage in the real estate records of the county where the real property is located that includes the requisite information (this approach is problematic for timber to be cut and as-extracted collateral).⁷³

To grant a security interest in: fixtures and timber to be cut, the debtor must have rights in the collateral;⁷⁴ or as-extracted collateral, the debtor must have an interest in that collateral before extraction.⁷⁵ If that is an issue, the secured party's right to obtain a security interest in the debtor's after-acquired property may provide comfort.⁷⁶ A fixture filing included in the mortgage is effective until the mortgage becomes ineffective or the lender releases it, but where there is a separate fixture filing, the lender must file a continuation statement every five years or the fixture filing lapses.⁷⁷ The exception to the five-year limit applies to fixtures, but does not appear applicable to timber to be cut filings or as-extracted collateral filings.

As-Extracted Collateral

Oil, gas, and other minerals comprise real property until extracted from the ground, at which time it becomes

as-extracted collateral.⁷⁸ Because unextracted oil, gas and minerals are real property, it is necessary to file a mortgage under the local real estate laws to obtain a perfected lien. In this context, once extracted, oil, gas and minerals become as-extracted collateral, not goods.⁷⁹ Because the security interest does not attach until extraction, the filing continues to be effective after extraction.⁸⁰

As-Extracted Collateral Related Practice Tip

For as-extracted collateral, file a separate financing statement as an as-extracted collateral filing in the real estate records of the county where the real property is located and continue it every five years. If the secured party instead files a mortgage that is effective as an as-extracted collateral filing, continue it every five years by filing an amendment to the mortgage. Because amending a mortgage every five years is counterintuitive, it may be more likely for the secured party to overlook the lapse date than if it files a separate financing statement as an as-extracted collateral filing. If the secured party wants a lien in the oil, gas and minerals before extraction, it should record a mortgage under the local real estate laws.

Timber

Standing timber is real property until there is a conveyance or contract for sale to cut and remove it, at which time it becomes timber to be cut, which is a good under the UCC.⁸¹ Unlike as-extracted collateral, standing timber to be cut may be a good before it is cut.⁸² Because standing timber is real property until it becomes timber to be cut, it is necessary to file a mortgage under the local real estate laws to obtain a perfected lien in standing timber that is not timber to be cut. Once timber is cut, it ceases to be timber *to be cut* and becomes ordinary goods. That means the timber to be cut filing is no longer effective, and the secured party should file a financing statement under the rules that apply to ordinary goods.⁸³

Timber-Related Practice Tip

For timber to be cut, file:

- A separate financing statement as a timber to be cut filing in the real estate records of the county where the real property is located to cover the timber to be cut and continue it every five years; and

- A financing statement in the central filing office of the state where the debtor is located to cover the timber once it is cut and continue it every five years. If the secured party instead files a mortgage that is effective as a timber to be cut filing, continue it every five years by filing an amendment to the mortgage. Because amending a mortgage every five years is counterintuitive, it may be more likely for the secured party to overlook the lapse date than if it files a separate financing statement as a timber to be cut filing. If the secured party wants a lien in the timber before it becomes timber to be cut, it should record a mortgage under the local real estate laws.

FIXTURES

Fixtures are goods that are so related to particular real property that an interest in them arises under real property law.⁸⁴ We look to Montana real property law to determine whether a good is a fixture. We start with the Civil Field Code, which provides:

- Real property includes land and that which is affixed to it (i.e., a fixture); and
- Affixation occurs when the thing is (i) attached by roots, as with trees, vines, or shrubs, (ii) imbedded, as with walls, (iii) permanently resting upon it, as with buildings, or (iv) permanently attached to what is permanent as with cement, plaster, nails, bolts, or screws.⁸⁵

Illustrative of the problems with the Field Civil Code, we must then look to the common law for the factors that determine whether objects become fixtures:

- Annexation to the realty;
- An adaptation to the use to which the realty is devoted; and
- Intent that the objects become a permanent accession to the land.

Of those three factors, the intent of the parties is the controlling factor.⁸⁶ As part of the test, if one places property on land to improve the land and make it more valuable, the courts generally deem that property to be a fixture.⁸⁷ A fixture filing included in the mortgage is effective until the mortgage becomes ineffective or the lender releases it. However, where there is a separate fixture filing, the lender must file a continuation statement every five years or the fixture filing lapses.⁸⁸

Fixture Filing-Related Practice Tip

To perfect a security interest in fixtures in a transaction that includes a mortgage, provide language that makes the mortgage effective as a fixture filing rather than filing a separate financing statement as a fixture filing. A separate fixture filing is unnecessary. The fundamental purpose of a fixture filing is to allow a party that is financing fixtures, but who does not have a mortgage on the real estate, to file something in the real estate records establishing its priority regarding mortgages and other real estate interests. The mortgage lender is not such a party because it is recording a mortgage. On a related note, the Montana UCC deviates from the Uniform Act and that deviation could create an issue if the secured party makes a redundant fixture filing (i.e., files both a mortgage effective as a fixture filing and a separate financing statement filed as a fixture filing). That potential issue becomes moot if the secured party simply files a mortgage effective as a fixture filing and forgoes filing a separate financing statement as a fixture filing.⁸⁹

Conservation Easements

Montana land trusts and public agencies hold over 1,250 conservation easements that conserve over 2,100,000 acres.⁹⁰ Montana's Open-Space and Voluntary Conservation Easement Act governs the creation of a conservation easement, which is an easement or restriction running with the land where the landowner voluntarily relinquishes the right to construct improvements or substantially alter the natural character of the land, except as reserved in the easement. The conservation easement limits the use of the real estate to preserve open space, native plants or animals, biotic communities, and geological or geographical formations of scientific, aesthetic or educational interest.⁹¹ The landowner donates or sells a conservation easement

to a qualifying private nonprofit organization or public body, which enforces the terms of the conservation easement instrument. The landowner retains the private property rights to reside on and use the real estate subject to the conservation easement. The landowner's motivation for donating or selling a conservation easement is typically tax-related. The easement restricts development, so it can create a voluntary diminishment in property value for public benefit. The IRS considers the diminishment to be a charitable contribution, but there is no state-related tax relief. The term of the conservation easement must be at least 15 years, but many are perpetual.⁹² To receive the federal tax benefit, the conservation easement must be perpetual and a qualified appraiser must prepare a qualified appraisal to determine the value of the conservation easement based upon how much the restrictions devalue the land.

CONCLUSION

There are many other laws and practices in Montana relating to real estate acquisitions, but this article should provide the reader with a sufficient level of practical information to become familiar with the primary aspects of Montana real estate law and practices. Topics for another day include crop leases, land trusts, agricultural liens, foreclosures, receivers, ground leases, billboards and Montana's Unit Ownership Act. 🍷

Montana is the landscape that generations of dreamers, despots, adventurers, explorers, crackpots, and heroes fought and died for. It is one of the most beautiful places on Earth. There is no place like it.

—Anthony Bourdain
Parts Unknown, Season 7, Episode 4.

Notes

- 1 2017 Montana Economic Development Report, Matt Jackson, Governor's Office of Economic Development.
- 2 Id.
- 3 This section on Drafting is a compilation of thoughts and writings from *A Manual of Style for Contract Drafting*, Fourth Edition by Kenneth A. Adams, and his excellent online material at Adams on Contract Drafting, <http://www.adamsdrafting.com/>.
- 4 Mont. Code Ann. tit. 1, ch. 3.
- 5 This section on the Field Civil Code is a compilation of thoughts gathered from two excellent law review articles, Scott J. Burnham, *Let's Repeal the Field Code!*, 67 Mont. L. Rev. 31 (2006), and Robert G. Natelson, *Running with the Land in Montana*, 51 Mont. L. Rev. 17 (1990).
- 6 Montana Constitution, Article II, §3 (Declaration of Rights, Inalienable Rights), Article IX, §1 (Environment and Natural Resources, Protection and Improvement).
- 7 *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

- 8 Montana Constitution, Article IX, §3(3) (Environment and Natural Resources, Water Rights).
- 9 Mont. Code Ann. § 85-2-422 (Definition).
- 10 Montana Constitution, Article IX, §4 (Environment and Natural Resources, Cultural Resources).
- 11 Mont. Code Ann. tit. 76, ch. 6, secs. 1 and 2 (Open Spaces).
- 12 2017 Montana Economic Development Report, Matt Jackson, Governor's Office of Economic Development.
- 13 Mont. Code Ann. § 35-1-1026 (Authority to Transact Business Required).
- 14 Mont. Code Ann. § 70-1-305 (Ownership by a Single Person)
Mont. Code Ann. § 70-1-306 (Ownership by Several Persons – Types),
Mont. Code Ann. § 70-1-307 (Joint Interest Defined),
Mont. Code Ann. § 70-1-312 (Partnership Interest Defined),
Mont. Code Ann. § 70-1-313 (Interest in Common Defined).
- 15 Mont. Code Ann. § 70-1-307 (Joint Interest Defined).
- 16 See *Hennigh v. Hennigh*, 309 P.2d 1022 (Mont. 1957).
- 17 Mont. Code Ann. § 70-20-101 (Transfer to be in Writing – Statute of Frauds).
- 18 Mont. Code Ann. § 30-2-201 (Formal Requirements – Statute of Frauds).
- 19 Mont. Code Ann. § 70-20-202(3) (Extrinsic Evidence not to be Considered in Construction of a Deed – Exceptions).
- 20 Mont. Code Ann. § 70-20-103 (Form of Grant).
- 21 Mont. Code Ann. § 70-1-507 (Grand Defined).
- 22 Mont. Code Ann. § 70-20-304 (Implied Covenants – Free From Encumbrance),
Mont. Code Ann. § 70-20-305 (Encumbrance Defined).
- 23 Mont. Code Ann. § 30-11-109 (When Usual Common Law Covenants Required by Contracts),
Mont. Code Ann. § 30-11-110 (Form of Covenants),
Mont. Code Ann. § 70-20-306 (Responsibility of Covenantor – Certain Warranties Abolished).
- 24 Mont. Code Ann. §70-20-308 (Easements Pass with Property),
Mont. Code Ann. §85-2-403 (Transfer of Apportion Right),
Risk v. Toole County, 159 P.2d 340, 342 (Mont. 1945).
- 25 Mont. Code Ann. § 70-20-201 (Rules for Construing Description);
Conner v. Helvik, 73 P.2d 541, 547 (Mont. 1937).
- 26 Mont. Code Ann. § 70-21-201 (What may be Recorded – Recording Copy in another County),
Mont. Code Ann. § 70-21-208 (In what County to be Recorded),
Mont. Code Ann. § 70-21-302 (Recording as Constructive Notice).
Mont. Code Ann. § 70-21-202 (Certain Transfers in Trust – Mortgages – When to Be Recorded),
Mont. Code Ann.
- 27 Mont. Code Ann. § 70-21-102 (Unrecorded Instruments Valid Between Parties),
Mont. Code Ann. § 70-21-304 (Conveyance Void as Against Other Conveyance Recorded First).
- 28 Mont. Code Ann. § 70-21-202 (Certain Transfers in Trust – Mortgages – When to Be Recorded),
Mont. Code Ann. § 70-21-208 (In what County to Be Recorded).
- 29 Mont. Code Ann. § 7-4-2636 (Standards for Recorded Documents – Exemptions).
- 30 Mont. Code Ann. § 7-4-2637 (Fees for Recording Documents).
- 31 Mont. Code Ann. § 28-2-101 (Contract Defined),
Mont. Code Ann. § 30-11-101 (Sale Defined),
Mont. Code Ann. § 30-11-102 (Subject of Sale),
Mont. Code Ann. § 30-11-103 (Agreement for Sale),
Mont. Code Ann. § 30-11-104 (Agreement to Sell),
Mont. Code Ann. § 30-11-105 (Agreement to Buy),
Mont. Code Ann. §30-11-106 (Agreement to Sell and Buy).
- 32 Mont. Code Ann. § 30-11-108 (Agreement to Sell Real Property).
- 33 Mont. Code Ann. § 30-11-210 (No Implied Warranty in Mere Contract of Sale).
- 34 Mont. Code Ann. §75-3-606 (Radon Disclosure Statement of Real Estate Documents),
Mont. Code Ann. §70-20-113 (Notice of Presence of Smoke and Carbon Monoxide Detectors),
24 CFR part 35, 40 CFR part 745 (Lead-Based Pain Poisoning Prevention in Certain Residential Structures),
Mont. Code Ann. §37-51-105 (Sexual or Violent Offender Registration Information),
Mont. Code Ann. §70-16-703 (Mold Disclosure Statement on Real Estate Documents),
Mont. Code Ann. §7-22-2116 (Unlawful to Permit Noxious Weeds to Propagate – Notice Required in Sale).
- 35 *H-D Irrigating Inc., v. Kimble Properties*, 8 P3d 95 (Mont. 2000).
- 36 Mont. Code Ann. § 28-1-211 (Implied Covenant of Good Faith and Fair Dealing);
Pennington's Inc. v. Brown-Forman Corp., 785 F. Supp. 1412 (D. Mont. 1991);
Davey v. Nesson, 830 P.2d 92 (Mont. 1992).
- 37 *Zirkelbach Const. v. DOWL*, 402 P.3d 1244 (Mont. 2017);
Miller v. Fallon County, 721 P. 2d 342 (Mont. 1986);
Mont. Code Ann. § 28-2-702 (Contracts the Violate Policy of Law – Exemption from Responsibility – Exception).
- 38 Mont. Code Ann. § 28-2-721 (When Provision Fixing Liquidated Damages Valid).
- 39 *Arrowhead School District No. 75 v. Klyap*, 79 P.3d 250 (Mont. 2003).
- 40 This section on Exculpatory Clauses borrows heavily from thoughts in yet another excellent law review article on the subject by Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?* 89 Chi. –Kent. L. Rev. 1 (2014);
Mont. Code Ann. § 28-2-702 (Contracts the Violate Policy of Law – Exemption from Responsibility – Exception);
Miller v. Fallon County, 721 P.2d 342 (Mont. 1986).
- 41 *A Manual of Style for Contract Drafting*, Fourth Edition, Kenneth A. Adams, p. 388-389.
- 42 Burnham, *supra*.
- 43 Mont. Code Ann. § 25-10-301 (Determining Compensation of Attorneys);
Miller v. Titeca, 628 P.2d 670 (Mont. 1981).
- 44 *Foy v. Anderson*, 580 P.2d 114, 116-117 (Mont. 1978).
- 45 Mont. Code Ann. § 28-3-704 (Contractual Right to Attorney Fees Treated as Reciprocal).
- 46 Mont. Code Ann. § 27-1-411 (When Specific Performance of an Obligation may be Compelled),
Mont. Code Ann. § 27-1-412 (Obligations which cannot be Specifically Enforced).
- 47 *Morehouse v. Northern Land Co.* 216 P.2d 792 (Mont. 1923);
Mont. Code Ann. § 27-1-316(2) (Breach of Covenants in Grants of Estates in Real Property).
- 48 Mont. Code Ann. § 27-1-414 (Right to Specific Performance to be Mutual).
- 49 25 Williston on Contracts § 67:39, 40, 41; Restatement (Second) of Contracts: Effect of Insecurity as to the Agreed Exchange § 363 cmt. c. (1981).
- 50 *Id.*

- 51 Mont. Code Ann. §28-2-709 (Illegality of Agreement to Allow Another Person to Confess Judgment, Accept Service of Process, or Accept Default).
- 52 Water Rights in Montana, Water Policy Interim Committee, February 2018.
- 53 Montana Constitution, Article IX, section 3(3) (Environment and Natural Resources, Water Rights); Mont. Code Ann. § 85-2-422 (Definition).
- 54 Mont. Code Ann. § 85-2-102(4) (Definitions).
- 55 Mont. Code Ann. tit. 85, ch. 2 (Surface Water and Ground Water).
- 56 Mont. Code Ann. § 15-7-305 (Realty Transfer Certificate Required).
- 57 Mont. Code Ann. § 85-2-101(2) (Declaration of Policy and Purpose).
- 58 Mont. Code Ann. § 85-2-424 (Filing), Mont. Code Ann. §76-3-201(c) (Exemptions for Certain Divisions of Land).
- 59 Mont. Code Ann. tit. 85, chs. 6 (Water Users' Associations) and 7 (Irrigation Districts).
- 60 Wilson v. Omaha Tribe, 442 U.S. 653, 670-72, (1979).
- 61 Stokes v. Tutvet, 328 P.2d 1096, 1099 (Mont. 1958).
- 62 Risk v. Toole County, supra.; Mont. Code Ann. §76-3-201(c). Parts of this section on Mineral Rights borrow heavily from Split Estates, the Impact of Mineral Rights on Property Values and Use, Our Corner, Spring/Summer 2017.
- 63 Mont. Code Ann. ch. 82, tit. 2, sec. 3 (Landowner Notification of Surface Operations); ch. 82, tit. 10, sec. 5 (Surface Owner Damage and Disruption Compensation).
- 64 Hurley v. Northern Pacific Railway Co., 455 P.2d 321 (Mont. 1969).
- 65 Mont Code Ann. §70-20-101 (Transfer to be in Writing – Statute of Frauds).
- 66 <http://mtbeef.org/dev/wp-content/uploads/2014/07/grazinghandbook.pdf>.
- 67 Mont Code Ann. ch. 76, tit. 16 (Grazing Districts).
- 68 See Opinions of the Attorney General volume 42, opinion number 127.
- 69 Mont. Code Ann. § 76-16-207 (Filing of Map or Plat of State District).
- 70 Mont. Code Ann. § 76-16-409 (Transfer of Underlying Property).
- 71 Mont. Code Ann. § 30-9A-501(1)(b), -502(1); § 30-9A-334(1)-(8).
- 72 Mont. Code Ann. § 30-9A-102(a)(nn), -301(3), -301(4), -501(1)(a), -502(2), -519(4), -519(5); Mont. Code Ann. § 70-21-202 (Certain Transfers in Trust – Mortgages – When to be Recorded), Mont. Code Ann. § 70-21-208 (In what County to be Recorded).
- 73 Mont. Code Ann. § 30-9A-501(1)(a), -502(3).
- 74 Mont. Code Ann. § 30-9A-203(2)(b).
- 75 Mont. Code Ann. §30-9A-102(1)(f).
- 76 Mont. Code Ann. § 30-9A-204.
- 77 Mont. Code Ann. § 30-9A-515(7).
- 78 Mont. Code Ann. §30-9A-102(1)(f); Official Comment 4.c to Mont. Code Ann. § 30-9A-102.
- 79 Mont. Code Ann. § 30-9A-102(1)(rr)(iii).
- 80 Official Comment 3 to Mont. Code Ann. § 30-9A-501.
- 81 Mont. Code Ann. § 70-15-103(1) (Fixture Defined); § 30-9A-102(1)(rrr)(B). § 30-9A-102(1)(hh).
- 82 Official Comment 3 to Mont. Code Ann. § 30-9A-501.
- 83 Mont. Code Ann. § 30-9A-301(1), -501(1)(b).
- 84 Mont. Code Ann. § 30-9A-102(1)(oo).
- 85 Mont. Code Ann. § 70-1-106 (Real Property Defined), Mont. Code Ann. § 70-15-101 (Real Property Defined), Mont. Code Ann. § 70-15-103 (Fixture Defined).
- 86 Schwend v. Schwend, 983 P.2d 988, 991 ¶ 15 (Mont. 1999).
- 87 Cascade Electric v. Assoc. Creditors, 224 P.2d 146, 150 (Mont. 1950).
- 88 Mont. Code Ann. § 30-9A-515(7).
- 89 Mont. Code Ann. § 30-9A-515(3), Mont. Code Ann. § 30-9A-515(7). If a lender perfects its security interest in fixtures both by recording a mortgage effective as a fixture filing and by filing a separate financing statement filed as a fixture filing, it still has a single security interest in the fixtures despite the redundant filing. If the financing statement filed as a fixture filing lapses, it ceases to be effective and the security interest becomes unperfected, unless the security interest is perfected without filing. The deviation is Montana's use of the phrase without filing in lieu of the Uniform Act's use of the word otherwise. Otherwise encompasses perfection by recording a mortgage effective as a fixture filing, whereas without filing appears to capture perfection accomplished by possession or control, which excludes fixtures because we perfect a security interest in fixtures by filing. A mortgage effective as a fixture filing is effective until the lender releases it or its effectiveness otherwise terminates. If the (single) security interest becomes ineffective due to the lapse or failure to file a continuation statement, there may be an argument that the mortgage becomes ineffective as a fixture filing.
- 90 Montana Association of Land Trusts, <http://www.montanalandtrusts.org/faqs>.
- 91 Mont. Code Ann. tit. 76, ch. 6, secs. 1 and 2 (Open Spaces), Mont. Code Ann. § 76-6-103 (Purposes).
- 92 https://www.irs.gov/pub/irs-utl/facade_easement_brief_june_2009_final_revision_08272009.pdf.