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Sept. 13, 2018

Exhibit 13

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September 10, 2018

To: Environmental Quality Council Members
From: Erin Bills, EQC Legal Staff
Re: Legal Analysis Regarding Montana Department of Fish, Wildlife, and Park Authority to Acquire Conservation Easements without Montana Board of Land Commissioners' Approval

At the July 2018 Environmental Quality Council (EQC) meeting, the council questioned the authority of the Montana Department of Fish, Wildlife, and Parks (FWP) to acquire conservation easements without the approval of the Montana Board of Land Commissioners (Land Board) pursuant to section 87-1-209(1), MCA. This memorandum provides a brief history of land interests and acquisitions, summarizes the arguments of the FWP and attorney general (AG) along with relevant legislative history, and provides options for the Montana Legislature to consider.

The issue is whether an acquisition of a conservation easement by the FWP is considered a "land acquisition" under the plain meaning of the term as used in section 87-1-209(1), MCA. This is an unsettled area of law insofar as Montana Supreme Court precedent. In a draft opinion, the attorney general concludes Land Board authority is required. If this is the final conclusion of the attorney general and it is not challenged or it withstands challenge, that is how the law will be interpreted going forward. The Montana Legislature has the authority to clarify this area of law for future transactions.

I. Background

The Land Board has the constitutional authority "to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law."[1] The Montana Constitution sets out Land Board authority regarding public land trust disposition:

> **Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the

[1] Art. X, sec. 4, Mont. Const.

> people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.
> (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
> (3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.
> (4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

The Montana Legislature has statutorily outlined the powers and duties of the Land Board to "exercise general authority, direction, and control over the care, management, and disposition of state lands..."[2] In addition, the Legislature has passed various acts to fulfill these constitutional principles. Specific to the issue presented, section 87-1-209(1), MCA, sets the authority regarding Land Board approval of FWP land acquisitions. The law requires that:

> Subject to 87-1-218 and subsection (8) of this section, the department, with the consent of the [fish and wildlife] commission or the board and, *in the case of land acquisition involving more than 100 acres or $100,000 in value*, the approval of the board of land commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection. [emphasis added]

As enacted, the statute requires Land Board approval of a "land acquisition involving more than 100 acres and $100,000 in value." At issue is whether a conservation easement falls within the plain meaning of the term "land acquisition" or is an interest in land.

II. Interests in Land

Several different types of property interests exist. It is possible for different interests in land to be held or owned by different persons or entities for the same piece of land. Specific to the issue presented, this section will focus on two types of ownership interests: fee title and easements.

A. Fee Title

A "fee title," or "fee simple absolute," ownership interest is the largest estate recognized by law. It is a present possessory estate that gives the holder the right to present possession. Under Montana law, ownership of property is defined as "the right of one or more persons to possess

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[2] 77-1-202, MCA.

and use it to the exclusion of others [...] the thing of which there may be ownership is called property."[4]

B. Easements

Easements are nonpossessory interests in land, creating a right to use land possessed by someone else. An easement holder has the right to use another's tract of land for a special purpose but has no right to possess or enjoy that land. An easement is presumed to be of perpetual duration unless the grant specifically limits the property interest. Under Montana law, an easement is not a grant of title to land, but rather a right that attaches to the land as either a "burden" or "servitude."[5] The extent of the servitude is "determined by the terms of the grant or the nature of the enjoyment by which it was acquired."[6] The Montana Supreme Court has held that an easement is "a non-possessory interest in land that gives rights to a person to use another's land for a specific purpose or as a servitude imposed on the land as a burden."[7] Furthermore, the Court has also found that "an easement is a property right protected by the constitutional guarantees against the taking of private property without just compensation."[8]

Conservation easements are a specific type of easement that establish a right by the holder of the easement to prohibit certain uses on the land. The term "conservation easement" is not defined in Title 87 or 77 of the Montana Code Annotated, but it is in Title 76, chapter 6. As defined under Title 76, the term means:

> [...] an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.[9]

Additionally, "[w]here a public body acquires under [Title 76, chapter 6] an interest in land less than fee, this acquisition shall be by conservation easement."[10] Unless otherwise stated, conservation easements transfer with the sale of land mean. A public body or a private, qualified

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[4] 70-1-101, MCA.
[5] 70-17-101, MCA.
[6] 70-17-106, MCA.
[7] *Ganoung v. Stiles*, 2017 MT 176, ¶ 15, 388 Mont. 152, 398 P.3d 282 (citing *Woods v. Shannon*, 2015 MT 76, ¶ 10, 378 Mont. 365, 344 P.3d 413).
[8] *City of Missoula v. Mix*, 123 Mont. 365 at 370, 214 P.2d 212 (1950).
[9] 76-6-104(2), MCA.
[10] 76-6-201(1), MCA.

organization may acquire a conservation easement by a property owner through a grant or purchase.[11]

III. Land Acquisition

The term "land acquisition" is not defined in the Montana Code Annotated and the Montana Supreme Court has not issued a binding opinion on this topic. Based on a recent conservation easement transaction, the legal question interpreting this term was presented to the AG.[12] An AG opinion carries the weight of law until a court overturns the opinion or the Legislature changes the law.

A. Existing Legal Opinions

The FWP wrote two legal memoranda concerning this issue.[13] The first FWP legal memorandum, dated March 23, 2018, was authored by Zach Zipfel, FWP Agency Legal Counsel. The second FWP legal memorandum, dated July 31, 2018, was authored by Becky Dockter, FWP Chief Legal Counsel. A formal opinion by the Attorney General on this issue was requested pursuant to section 2-15-501(7), MCA, on August 1, 2018. On August 28, 2018, Deputy Attorney General Rob Cameron distributed a draft opinion on the issue to EQC members. Comments and proposed modifications may be made until September 12, 2018.

The FWP legal opinion dated July 31, 2018, concludes that the acquisition of "land" and the acquisition of conservation easements may be treated differently and, therefore, the FWP is not required to seek Land Board approval for the acquisition of conservation easements. The FWP opinion relies on the legislative history and the fact that conservation easements do not affect the tax base. The FWP concludes that the Montana Legislature made an "intentional distinction between 'interests' and outright 'land acquisition.'"[14]

However, the attorney general draft opinion asserts that the acquisition of an interest in land as used in section 76-6-201(1), MCA, and "land acquisition" as the term is used in 87-1-209(1), MCA, are synonymous.[15]

In general, standard rules of statutory interpretation would argue that words have meaning and the use of different phrases suggests different meaning. Both of the FWP legal opinions and the draft attorney general opinion cite to section 87-1-301(1)(e), MCA, in arguing whether a conservation easement is considered a "land acquisition." This section of law states that "[the Fish and Wildlife Commission] shall approve *all acquisitions* or transfers by the [FWP] *of*

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[11] 76-6-106 and 76-6-204, MCA.
[12] See attached Montana Draft Opinion Attorney General No. 3 (2018).
[13] See attached FWP legal memoranda dated March 23, 2018, and July 31, 2018.
[14] FWP Memo at 3 (July 31, 2018).
[15] Montana Draft Opinion Attorney General No. 3 (2018).

interests in land or water..." (emphasis added). If the acquisition of a conservation easement is considered an "acquisition . . . of interests in land" and not a "land acquisition", the FWP reasons that approval of conservation easement acquisitions requires approval by the Fish and Wildlife Commission and not the Land Board. The FWP concludes that the legislative history points to a concern over fee title acquisition. The draft attorney general opinion argues that regardless of effect on tax base and notice requirements under section 87-1-218(3)(c), MCA, there is no distinction between "land acquisition" and "acquisition . . . of interest in land."

B. Legislative History and Practical Application

The AG cites testimony from the same 1981 session in which the FWP director says language similar to what is at issue today will affect the ability to obtain conservation easements. Practical application demonstrates the Land Board has approved all conservation easements acquired by the FWP. The AG opinion could find no other easement over 37 years that did not obtain Land Board approval.[16] The FWP has also said in Montana Environmental Policy Act documents that Land Board approval is required. However, in recent weeks, the FWP has asserted that Land Board approval is a courtesy.[17]

IV. Conclusion

No Montana case exists that directly clarifies whether the FWP is required to gain approval by the Land Board prior to acquiring a conservation easement. If the AG opinion reflects the draft and remains unchallenged or survives a challenge, all future FWP conservation easements will require Land Board approval. The EQC or an individual legislator may propose changes to the law.

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[16] Montana Draft Opinion Attorney General No. 3 (2018).
[17] FWP Memo dated July 31, 2018.

Draft

VOLUME NO. 57 OPINION NO. 3

FISH, WILDLIFE, AND PARKS, DEPARTMENT OF – Statutory requirement of Board of Land Commissioners' approval of easements involving more than 100 acres or $100,000 in value;
LAND COMMISSIONERS, BOARD OF - Authority of Board of Land Commissioners to approve or disapprove Fish, Wildlife, and Parks conservation easement acquisitions;
LAND USE – Applicability of Mont. Code Ann. § 87-1-209(1) to conservation easements purchased by Department of Fish, Wildlife, and Parks;
PROPERTY, REAL – Inclusion of conservation easements within the meaning of "land acquisition" as the term is used in Mont. Code Ann. § 87-1-209(1)
STATUTORY CONSTRUCTION – When the Legislature has not defined a statutory term, courts consider the term to have its plain and ordinary meaning;
MONTANA CODE ANNOTATED – Sections 70-17-111(2), 76-6-201(1), 76-6-208, 87-1-209, 87-1-209(1), 87-1-218(3)(c), 87-1-301(1)(e), 87-1-603.

HELD: Montana law requires that the Department of Fish, Wildlife, and Parks obtain prior approval of the Board of Land Commissioners for acquisitions of easements, including conservation easements, if they involve more than 100 acres or $100,000 in value.

August 28, 2018

President Scott Sales
P.O. Box 200500
Helena, MT 59620-0500

5200 Bostwick Road
Bozeman, MT 59715

Dear President Sales:

[P1] You have requested my opinion on a question I have restated as follows:

> Does Montana law require that the Montana Department of Fish, Wildlife, and Parks (FWP) obtain the approval of the Montana Board of Land Commissioners (Land Board) for FWP's acquisition of easements, including conservations easements, if they involve more than 100 acres or $100,000 in value?

[P2] In preparing this Opinion, I have considered the analysis you provided, as well as two memoranda supplied by FWP dated March 23 and July 31, 2018.

[P3] Section 87-1-209(1) addresses the circumstances in which FWP is required to obtain Land Board approval:

> Subject to 87-1-218 and subsection (8) of this section, the department [of fish, wildlife, and parks], with the consent of the [fish and wildlife] commission or the [the state parks and recreation] board and, ***in the case of land acquisition involving more than 100 acres or $100,000 in value***, the approval of the board of land commissioners, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.

(Emphasis added.) The statute requires Land Board approval of "land acquisition[s] involving more than 100 acres or $100,000 in value." The dispositive issue is whether FWP's acquisition of an easement is a "land acquisition" within the meaning of Mont. Code Ann. § 87-1-209(1).

1. Plain Meaning of "Land Acquisition"

a. Montana Legislative Intent Concerning the Meaning of "Land Acquisition"

[P4] Under Montana law, an easement is "a non-possessory interest in land that gives rights to a person to use another's land for a specific purpose or as a servitude imposed on the land as a burden." *Ganoung v. Stiles*, 2017 MT 176, ¶¶ 14-15, 388 Mont. 152, 398 P.3d 282 (citing *Woods v. Shannon*, 2015 MT 76, ¶ 10, 378 Mont. 365, 344 P.3d 413).

> [T]he grant of an easement, unlike a leasehold, permanently conveys a property interest to another person. The grantor retains no supervisory regulatory control over the property interest conveyed by the easement.

Williamson v. Commissioner, 974 F.2d 1525, 1535 (9th Cir. 1992) (citing R. Cunningham, W. Stoebuck, D. Whitman, The Law of Property § 8.1 (1984)).

[P5] In Montana, a public body's acquisition of "an interest in land less than fee . . . shall be by conservation easement." Mont. Code Ann. § 76-6-201(1). It necessarily follows that acquisition of a conservation easement is an "acquisition of an interest in land." Mont. Code Ann. § 76-6-201(1). The issue thus becomes whether "acquisition of an interest in land" is synonymous with "land acquisition" as the term is used in Mont. Code Ann. § 87-1-209(1).

[P6] "Land acquisition" is not defined in Title 87, or elsewhere in the Montana Code. Nor has the Montana Supreme Court defined or addressed the meaning of the term. Consequently, we turn to well established rules of statutory construction to ascertain the legislature's intent for its meaning.

[P7] In construing a statute, courts look first to the plain meaning of the words it contains. *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995). Where the language is clear and unambiguous, the statute speaks for itself and courts will not resort to other means of interpretation. *Id.* "In the search for plain meaning, 'the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.'" *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445 (1986); *see also Westmoreland Res. Inc. v. Dep't of Revenue*, 2014 MT 212, ¶ 11, 376 Mont. 180, 330 P.3d 1188 ("We ascertain legislative intent from the plain meaning of the words used in a statute."). In summary, if the language is unambiguous, courts look no further than the plain language of the statute to determine legislative intent. *Bassett v. Lamantia*, 2018 MT 119, ¶ 24, 391 Mont. 309, 417 P.3d 299.

[P8] In applying the foregoing principles to determine the meaning of "land acquisition," it is significant that legally cognizable interests in land take various forms with varying degrees of associated rights, and are categorized by highly specific terms; *e.g.*, fee simple, life estate, leasehold interest, easement in gross, easement appurtenant, and numerous others. One may refer to "fee simple acquisition," or "life estate acquisition," or "acquisition of leasehold interest" and thereby indicate the specific nature of the interest acquired.

[P9] "Land acquisition," in material contrast, is quite ***non***-specific and it is logical to infer the legislature intended it to be so. Unlike those terms referenced above, "land

acquisition" is not a specialized term of art in real property law; and does not describe any particular property interest, but instead reflects a general concept: acquisition of a legally cognizable interest in land. The significance of this point cannot be overstated, as it reflects a legislative intent to encompass the spectrum of various types of real property legal interests subject to acquisition. Indeed, later in the same sentence, Mont. Code Ann. § 87-1-209(1) describes the scope of "land acquisitions;" *i.e.*, land "acquire[d] by purchase, lease, agreement, gift, or devise" and "easements upon lands or waters." The term encompasses easements generally and conservation easements specifically.

[P10] In its memoranda, FWP asserts that "land acquisition" should be read narrowly to mean only "fee title acquisition." If that were the legislature's intent, it is reasonable to assume that the legislature would have used the term "fee title acquisition," rather than "land acquisition" in Mont. Code Ann. § 87-1-209(1) and the statute would provide that Land Board approval is required "in the case of ***fee title acquisition*** involving more than 100 acres or $100,000 in value." The legislature did not do so. In short, if the legislature meant "fee title acquisition" it would have said "fee title acquisition."

[P11] Indeed, when the legislature intends to convey the concept of fee title, it uses the terms "fee title" or "fee title acquisition." *See, e.g.*, Mont Code Ann. § 70-17-111(2) ("fee title"); and Section 2, Ch. 319, L. 1991 (Study Required — Report to 1993 Legislature):

> (1) The department of fish, wildlife, and parks shall commission an independent comprehensive study of wildlife habitat acquisition, improvement, and development, to be funded in an amount up to $150,000 from money allocated under 87-1-242(3).
>
> (2) The study must analyze the department's current wildlife habitat acquisition, improvement, operations, maintenance, and development program and develop a comprehensive plan for a permanent wildlife habitat acquisition, improvement, operations, maintenance, development, and land management program, including the use of conservation easements, leases, and ***fee title acquisition***.

(Emphasis added.) The fact that the legislature uses the term "fee title" elsewhere in the code and uses a different term, land acquisition, in Mont. Code Ann. § 87-1-209(1) creates a presumption the legislature intended a meaning different from "fee title" in § 209(1). *See, e.g., Zinvest, Ltd. Liab. Co. v. Gunnersfield Enters.*, 2017 MT 284, ¶ 26, 389 Mont. 334,

405 P.3d 1270 (Where different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect.).

[P12] FWP also asserts that acquisition of a conservation easement and acquisition of land are different, because a conservation easement is a non-possessory interest that "does not allow the holder the use of the land" and therefore should not be considered a land acquisition. FWP Memo at 2 (July 31, 2018). As applied to the conservation easements purchased by FWP, this is simply not true. For example, a primary purpose of the recently acquired Horse Creek Conservation Easement is "to provide to the Department pursuant to its authority to acquire interests in land at § 87-1-209, MCA, on behalf of the public, the right of reasonable access to the Land for recreational uses." Horse Creek Complex 2 (FWP) Deed of Conservation Easement at 3 (Mar. 30, 2018). Such recreational uses of the Land include extensive recreational hunting, trapping, and wildlife viewing. FWP's assertion that a conservation easement does not allow the use of the land, and therefore should not be considered a land acquisition, is thus not accurate.

b. The County Commissioner Notice Provisions of Mont. Code Ann. § 87-1-218(3)(c) Do Not Support an Argument that Land Board Approval Is Unnecessary.

[P13] Additionally, in support of its contention that Mont. Code Ann. § 87-1-209 does not require Land Board approval of conservation easement acquisitions, FWP relies on Mont. Code Ann. § 87-1-218(3)(c), which requires FWP to provide notice to county commissioners in the county of the proposed land acquisition of:

> (a) a description of the proposed acquisition, including acreage and the use proposed by the department;
>
> (b) an estimate of the measures and costs the department plans to undertake in furtherance of the proposed use, including operating, staffing, and maintenance costs;
>
> (c) an estimate of the property taxes payable on the proposed acquisition and a statement that if the department acquires the land pursuant to 87-1-603, the department would pay a sum equal to the amount of taxes that would be payable on the county assessment of the property if it was taxable to a private citizen; and

(d) a draft agenda of the meeting at which the proposed acquisition will be presented to the commission or the board and information on how the board of county commissioners may provide comment.

[P14] FWP does not pay property tax on conservation easements it holds. *See* Mont. Code Ann. § 76-6-208. For property it owns, FWP does generally pay the county a sum equal to the amount of taxes that would be payable on county assessment of the property if it was taxable to a private citizen. Mont. Code Ann. § 87-1-603. Because FWP is required to provide county commissioners with a property tax estimate for "land acquisitions," and FWP pays no property tax on conservation easement acquisitions, FWP reasons that a conservation easement is not a "land acquisition."

[P15] I respectfully disagree. A notice provision is intended to give relevant information, including that there is no impact from the proposal. If the estimate of property taxes payable is zero, that is relevant information, just like it is relevant information when agencies give notice that the fiscal impact of proposed legislation is zero. Simply because the impact on property taxes for a conservation easement is zero does not indicate that the legislature did not intend conservation easements to be within the meaning of land acquisition.

c. The Distinction Between "Land Acquisition" in Mont. Code Ann. § 87-1-209(1) and "Acquisitions . . . of Interests in Land" in Mont. Code Ann. § 87-1-301(1)(e).

[P16] In both memoranda, FWP argues a distinction between "land acquisition" in Mont. Code Ann. § 87-1-209(1) and "acquisitions . . . of interests in land" in Mont. Code Ann. § 87-1-301(1)(e). It appears that FWP is referring to the rule of statutory construction that the legislature's use of different language in different parts of a statute creates a presumption that the legislature intended a different meaning and effect. *See, e.g., Zinvest* at ¶ 26.

[P17] FWP argues that the legislature's use of different terms in these statutes requires us to construe them as having different meanings. Specifically, § 301 clearly includes easements, and uses the phrase "interests in land;" and in § 209, the legislature uses a different term, "land acquisition." FWP argues that if the legislature intended to include easement in the scope of § 209, it would have used the phrase "acquisition of interests in land."

[P18] The foregoing rule does not apply, however, because the legislature was in fact addressing ***two different concepts***. The statutes must be read in full. Section 87-1-301(1)(e) sets forth the Fish and Wildlife Commission's broad authority to "approve ***all*** acquisitions ***or transfers*** by [FWP] of interests in land ***or water***." (Emphasis added.) The significantly narrower language of § 87-1-209(1), in contrast, sets forth the authority of the Land Board to approve only a much smaller sub-set: only those "land acquisition ***involving more than 100 acres or $100,000 in value***." "[A]ll acquisitions or transfers of interests in land or water" in § 301 is a substantively different and broader concept than "land acquisitions" in § 209. So, of course, the legislature used different terms to reflect those different concepts.

[P19] Moreover, even FWP seems to acknowledge that "interests in land" encompasses land acquisitions it is entitled to make pursuant to Mont. Code Ann. § 87-1-209. *See, e.g.*, Horse Creek Complex 2 (FWP) Deed of Conservation Easement, at 3 (March 30, 2018) (recognizing that authority to purchase Horse Creek Easement was "pursuant to its authority to acquire *interests in land* at § 87-1-209, MCA").

d. Plain Meaning of "Land Acquisition" in Other Jurisdictions

[P20] As noted above, "land acquisition" is not defined by Montana statute or case law. However, numerous other jurisdictions, in a variety of legal contexts, have universally recognized the term "land acquisition" to encompass acquisition of easements. *See, e.g.*, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597-98 (1973) (recognizing that "land acquisitions might include reservations, easements, and rights of way" under Migratory Bird Conservation Act); *Columbia v. Costle*, 710 F.2d 1009, 1013 (4th Cir. 1983) (acquisition of easements comes within the "the land acquisition policies" of federal Uniform Relocation and Real Property Acquisitions Policies Act); *Otay Mesa Prop., L.P. v. United States*, 110 Fed. Cl. 732, 738 (2013) (recognizing that valuation of permanent easement by government is determined under government-published Uniform Appraisal Standards for Federal ***Land Acquisition***) (emphasis added); *United States v. Am. Elec. Power Serv. Corp.*, 2007 U.S. Dist. LEXIS 104330, at *133-34 (S.D. Ohio Oct. 9, 2007) ("land acquisition means purchase of interests in land, including fee ownership, easements, or other restrictions that run with the land that provide for perpetual protection of the acquired land"); and *Hire v. Bd. of Cty. Comm'rs*, 175 N.E.2d 326 (Ohio 1960) (cost of easement constitutes "cost of land acquisition"). These authorities, though not controlling, support the conclusion that the plain meaning of "land acquisition" includes acquisition of easements. We could find no jurisdiction that reached a contrary result.

[P21] In summary, I conclude that the plain meaning of "land acquisition" includes acquisition of easements generally, and conservation easements specifically. Section 87-1-209(1) of the Montana Code requires that FWP obtain the approval of the Land Board for FWP's acquisition of easements of the requisite size and/or cost.

2. Legislative History

[P22] The Montana Supreme Court has held that reliance on legislative history is unnecessary when the language of the statute is clear and unambiguous on its face. *See, e.g., Richland Aviation, Inc. v. State*, 2017 MT 122, ¶ 12, 387 Mont. 409, 394 P.3d 1198 (quoting *State v. Goebel*, 2001 MT 73, ¶ 21, 305 Mont. 53, 31 P.3d 335. Nonetheless, the Court does, at times, find legislative history instructive in cases where the statute is unambiguous. *See, e.g., Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 13, 362 Mont. 1, 261 P.3d 570. This is such a case.

a. 1981: HB 251 and HB 766.

[P23] Two bills pertaining to oversight of FWP land acquisitions were introduced in the 1981 Legislative Session. First, Representative Aubyn Curtiss introduced HB 251, which would have required legislative approval of FWP land acquisitions of 100 acres or $10,000. HB 251 did not pass out of committee. Immediately thereafter, HB 766 was introduced. As originally drafted, HB766 would have required the governor's approval of the FWP land acquisitions. HB 766 was amended to provide, as it does today, for Land Board approval of FWP acquisitions involving more than 100 acres or $100,000 in value and was thereafter signed into law.

[P24] FWP has asserted that the legislative history of the relevant language reflects the legislature's intent to address concerns regarding erosion of the tax base which resulted from FWP's acquisition of fee title to land. Because acquisitions of conservation easements generally have no effect on the tax base, FWP reasons that the legislature could not have intended "land acquisition" to include easements. FWP overlooks additional important aspects of the relevant legislative history.

[P25] Loss of tax revenues was, indeed, one concern of the legislature. It was not, however, the only one. For example, Representative Curtiss, the primary sponsor of HB 251, testified she was "concerned with the amount of money the F.W. & P. can spend on land acquisition." *See* Minutes of the Meeting of the Fish and Game Committee, at 3 (Jan. 24, 1981).

[P26] Perhaps most significantly, then-FWP Director Jim Flynn testified in opposition and offered written testimony which included the following points describing FWP's concerns regarding the practical effect of the "land acquisition" language of HB 251:

> ***Passage of this bill will affect <u>all acquisitions</u> by the department regardless of the purpose for acquisition.***
>
> ***The department's acceptance of <u>conservation easements</u> would be curtailed also, if not shut down entirely, in the same manner as donations or other receipts of gifts.***

House Minutes of the Meeting of the Fish and Game Committee, Exh. 2 at 2, 4 (Jan. 24, 1981) (emphasis added). The Director of the agency responsible for implementing and complying with the statute thus acknowledged that the statutory language "land acquisition" encompasses "all acquisitions" by FWP. More to the point, Director Flynn thereby expressly acknowledged that the statute applies to – and potentially restricts FWP's power to acquire – conservation easements.[1]

[P27] Flynn was Director of FWP at the time the statute was enacted. Significantly, FWP would follow Director Flynn's construction of the statute and seek consent of the Land Board for conservation easement acquisitions in compliance with the statute for the next 37 years.

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[1] Although HB 251 died in committee, HB 766 was introduced immediately thereafter, containing the same "land acquisition" language. Consequently, FWP Director Flynn testified in opposition to HB 766 and offered written testimony which incorporated by reference the above-quoted testimony, as follows:

> ***HB 251 was designed to do essentially the same thing as HB 766 . . . <u>For purposes of this testimony, please consider the information presented on HB 251</u>, particularly the amount of lands purchased and leased by the department.***

House Minutes of the Meeting of the Fish and Game Committee, Exh. 7 at 1 (Feb. 19, 1981) (emphasis added).

b. 1987: HB 526 (Habitat Montana)

[P28] The 1987 Montana Legislature passed HB 526, establishing the "Habitat Montana" program for FWP acquisition and maintenance of wildlife habitat. Once again, then-Director Flynn's testimony sheds considerable light on FWP's land acquisition process under Mont. Code Ann. § 87-1-209(1). Specifically, in testifying before the House Fish and Game Committee, FWP Director Flynn explained that some land acquisitions are in fee title, while others utilize conservation easements. In emphasizing the extensive independent review of all FWP acquisitions, Director Flynn describes the final step in the completed land acquisition processes as follows:

> ***The final step was review by the State Land Board consisting of the Governor, Secretary of State, Attorney General, Auditor and Superintendent of Public Instruction.***

House Minutes of the Fish and Game Committee at 4 (Feb. 17, 1987) (emphasis added). The context clearly indicates that the "acquisitions" include both fee title and conservation easement acquisitions.

3. FWP's Long and Continued Course of applying Mont. Code Ann. § 87-1-209(1).

[P29] FWP has historically sought the approval of the Land Board of its acquisitions of all conservation easements involving more than 100 acres or $100,000 in value. From the 1981 enactment of the "land acquisition" provision of Mont. Code Ann. § 87-1-209(1) to 2018, FWP recognized its obligation to submit conservation easement acquisitions to the Land Board for approval. In fact, our research has revealed no instance of FWP acquiring a conservation easement of the requisite size and cost without first seeking Land Board approval since the 1981 Legislature amended Mont. Code Ann. § 87-1-209(1), with the exception of the recently acquired Horse Creek Easement in eastern Montana.

[P30] Moreover, FWP's own internal guidance documents reflect it recognizes the necessity of Land Board approval. For example, the "FWP Process for Wildlife Land Acquisitions" (ver. 8 12 2015), places requirements for "land acquisitions" into three categories: 1) fee projects; 3) conservation easement projects; and 3) all land projects (fee and easement projects combined). While the document recognizes the distinction between fee projects and easement projects, it clearly places them both under the umbrella of "Land Acquisitions." Most significantly, this FWP policy at # 21 expressly recognizes the

necessity of Land Board approval of "***all*** acquisitions of greater than 100 acres or $100,000 in value" for "All Land Projects" – both fee and easement acquisitions.

[P31] Similarly, FWP has prepared Environmental Assessments expressly recognizing that "[a]s with other FWP property acquisition proposals, the Fish Wildlife and Parks Commission and ***the State Land Board*** (for easements greater than 100 acres or $100,000) ***must approve any easement proposal*** by the agency." Olsen Ranch Conservation Easement Draft EA at 1 (prepared by FWP) (emphasis added). Indeed, the Horse Creek Conservation Easement EA itself recognizes the necessity of submission of the Horse Creek Easement to the Land Board, including in its Timeline of Events, "Project Submitted to Montana State Board of Land Commissioners: February 2018." *Id.* at 16.

[P32] The January 2017 Draft EA for the Horse Creek Conservation Easement, at page 5, also discusses the decision whether FWP should move forward with purchase of the Horse Creek Conservation Easement, and states:

> *As with other FWP conservation projects that involve land interests, the Fish and Wildlife Commission* ***and the State Board of Land Commissioners would make the final decision****.*

[P33] Similarly, the January 2018 Draft EA for the Birdtail Conservation Easement, at page 8, discusses the decision whether FWP should move forward with purchase of the Birdtail Conservation Easement, likewise states:

> *As with other FWP conservation projects that involve land interests, the Fish and Wildlife Commission* ***and the State Board of Land Commissioners would make the final decision****.*

[P34] The FWP Public Scoping Notice (dated February 7, 2018) for the North Sunday Creek Conservation Easement states, at page 2, that the land project requires the "***approval from ... the Montana State Board of Land Commissioners.***"

[P35] Additionally, the FWP Public Scoping Notice (dated February 16, 2018) for the Antelope Coulee Conservation Easement also states, at page 2, that the land project requires the "***approval from ... the Montana State Board of Land Commissioners.***"

[P36] The above quoted public documents, and many others, constitute FWP's repeated assurances to the public that FWP's expenditures of funds for the easement acquisitions

would be subject to the independent scrutiny and approval of the governor, superintendent of public instruction, auditor, secretary of state, and attorney general.

[P37] Indeed, FWP continues to view conservation easements as "land acquisitions" up to the present. *See, e.g.*, FWP's 2017 Habitat Montana Legislative Report, p. 12 (describing the two types of "land acquisition projects": conservation easements and fee title).

[P38] When a statute's interpretation is placed in doubt, courts generally defer to an agency's "long and continued course of consistent interpretation, resulting in an identifiable reliance." *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶¶ 25, 305 Mont. 260, 265-66, 26 P.3d 91, 94. Here, as noted above, the language of the statute should not be in doubt. But even if it were, a court would generally defer to FWP's longstanding and consistent practice of declaring that Land Board approval of conservation easements over 100 acres or $100,000 is necessary under Mont. Code Ann. § 87-1-209(1). Governmental agencies and the public have reasonably relied on that decades-long application of § 87-1-209. Consequently, FWP's recent reversal of its long-held practice and position is entitled to no deference.

[P39] I am aware of no instance or document reflecting an intent on the part of FWP of submitting easement proposals to the Land Board "out of courtesy." Nonetheless, FWP claims that its historical submission of conservation easements to the Land Board for a vote was, in fact, a mere "courtesy." More specifically, FWP refers to its own "unsupported practice of seeking Land Board approval as a courtesy." FWP Memo at 2 (July 31, 2018). Seeking "approval" as a "courtesy" is contradictory on its face. One may give notice as a courtesy. Seeking approval in this context, in contrast, connotes a request for permission or authorization, without which the proposed action cannot be taken.

[P40] The necessity of Land Board approval is further evidenced by the Land Board's rejection of the Keogh Ranch Conservation Easement Amendment by a 3-2 vote on September 18, 2017. According to an article in the Montana Standard (Dec. 27, 2017), "[b]ecause the amendment failed at the Land Board Commission, FWP officials say they now hope to find another way to protect the Keogh Ranch from getting carved up." FWP thereby recognized that the Land Board's approval was required for amendment of the conservation easement, and the amendment was certainly not submitted to the Land Board as a mere "courtesy."

[P41] The remarkable suggestion that FWP has sought Land Board approval for every conservation easement since 1981 as a mere courtesy is simply unsupportable.

* * *

[P42] In summary, Mont. Code Ann. § 87-1-209(1) precludes FWP from acquiring interests in land – both fee ownership and conservation easements – involving more than 100 acres or $100,000 in value without Land Board approval.

THEREFORE, IT IS MY OPINION:

[P43] Montana law requires that the Department of Fish, Wildlife, and Parks obtain prior approval of the Board of Land Commissioners for acquisitions of easements, including conservation easements, if they involve more than 100 acres or $100,000 in value.

Sincerely,

TIMOTHY C. FOX
Attorney General

tcf/rc

TO: Raph Graybill

Chief Legal Counsel to the Governor

FROM: Becky Dockter

FWP Chief Legal Counsel

DATE: July 31, 2018

RE: Land Board Approval Not Required For Acquisition of Conservation Easements

Question Presented Whether FWP must seek Land Board approval for FWP's acquisitions of conservation easements of more than 100 acres or $100,000 in value.

Brief Answer No. The statute requires Land Board approval for land acquisitions but not for acquisition of conservation easements of the relevant size and value.

Discussion

This memo concurs and incorporates by reference the FWP March 23, 2018 memo which supports the same conclusion. In addition, FWP provides the following analysis to add to the discussion.

Mont. Code Ann. § 87-1-209, **Acquisition and sale of lands or waters**, subsection (1) provides:

> Subject to *87-1-218* and subsection (8) of this section, the department, with the consent of the commission or the board and, *in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners*, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.

(Emphasis added.)

This language at MCA §87-1-209 is controlling. The language is clear and unambiguous. FWP is not required to obtain approval from the Land Board for acquisitions of conservation easements as it seeks approval for land acquisitions. Generally, the statute provides authority to the department to obtain land and interests in land through the oversight approval of the Fish and Wildlife Commission (commission) or the Parks and Recreation Board (board). The only additional oversight required by the board of land commissioners (commonly referred to as the Land Board) is for "*land acquisition* involving more than 100 acres or $100,000 in value." MCA 87-1-209(1). The commission and board approve all acquisitions of interests in land and land itself. *See* MCA 87-1-301(1)(e). The Land Board does not approve all acquisitions, just those involving "land" acquisitions of relevant size and value.

While both "land" and "conservations easements" may be acquired, they are not both considered "land." It is true that "land acquisition" is not specifically defined in code. However, this is not relevant. The plain meaning of the statute requires only comparison of an acquisition of "land" and the acquisition of a "conservation easement" to determine whether Land Board oversight is required when the relevant size and value are met. A conservation easement interest is NOT referred to as "land" and the two are not interchangeable terms. In fact, the statute conferring approval authority to the commission refers to their broad authority over "all acquisitions ... of interests in lands." There is no question this includes acquisitions of conservation easements. The legislature did not refer similarly to the Land Board authority. *Compare,* MCA §87-1-209(1) ("land acquisitions") to MCA §87-1-301(1)(e) ("all acquisitions ... of interests in land). Courts look first to the plain meaning of the words a statute contains to ascertain their meaning. *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085 (1995). "In the search for plain meaning, 'the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.'" *Gaub v. Milbank Ins. Co.*, 220 Mont. 424, 427, 715 P.2d 443, 445) 1986).

The acquisition of *land* and the acquisition of a *conservation easement* are very different in their practical application. Land or property, as it is commonly referred to, is used or possessed by a landowner to the exclusion of others. MCA §70-1-101. By contrast, a conservation easement entitles the holder to a non-possessory interest in land that does not allow the holder the use of the land but solely to restrict its use in particular ways. *See* MCA § 76-6-203. The holder is allowed a limited monitoring right to step foot on land that is subject to the conservation easement, usually defined in the terms of the Deed of Conservation Easement. That limited right is very different from the right conferred to a landowner in land acquisitions. The statute at issue reflects this difference in its plain meaning.

Understanding this difference, the legislature provided commission and board oversight in its enabling statutes by describing it, "the commission ...shall approve *all acquisitions* or transfers by the department *of interests in land* or water..." MCA 87-1-301 (emphasis added). If the legislature desired the same oversight of the Land Board, it would have described it similarly in the statute in question here.

While the AGO Memo pays homage to the principle for construing a statute to look first to plain meaning of the words it contains, the legal reasoning fails to apply the principle when it refers to definitions of superfluous words (defining "easement," but not "conservation easement"), when it refers to the meaning of "land acquisitions" but in other jurisdictions, and when it uses FWP's unsupported practice of seeking Land Board approval as a courtesy as authority where it does not otherwise exist.

Legislative History

To the extent there is any ambiguity in the statute, legislative history resolves it. The language regarding "land acquisitions" was added to the statute to address a concern that FWP *fee*

purchases were eroding the local tax base. Conservation easements have no effect on the local tax base and were not contemplated by the legislature when amending §87-1-209.

During legislative sessions in the late 1970s and early 1980s, the legislature considered several bills that would require elected officials to give approval before FWP could remove land from the tax base. In 1981, the legislature passed a bill that required elected officials to approve such transactions, defined as "land acquisition[s] involving more than 100 acres or $100,000 in value." MCA §87-1-209. Early drafts of the bill placed approval authority for these transactions with the Governor. The final bill extended approval authority to the Land Board.

Conservation easements are a creature of statute in Montana dating to the late 1960s. Unlike fee purchases of land, they do not transfer ownership. Conservation easements have no effect on the local tax base.

Conclusion

The plain meaning of MCA 87-1-209 requires that an acquisition of "land" and the acquisition of a "conservation easement" be treated differently. If the legislature intended to require Land Board approval for the acquisition of a conservation easement, it would have referenced the same term, "acquisitions ... of interests in land," as it did in the enabling statute for the commission. *See* MCA 87-1-301(1)(e). It did not. Therefore, FWP is not required to seek Land Board approval for the acquisition of conservation easements.

MEMORANDUM

To: Martha Williams, Director
From: Zach Zipfel, Agency Legal Counsel
Re: Land Board Approval of Conservation Easements
Date: March 23, 2018

Question Presented

Whether, Mont. Code Ann. § 87-1-209 requires the Department of Fish, Wildlife and Parks ("FWP") to obtain Land Board approval for conservation easements?

Brief Answer

While the Department has taken conservation easements over 100 acres or $100,000 in value to the Land Board out of courtesy, the plain language of Mont. Code Ann. § 87-1-209, as well as other statutes, does not require Land Board approval for FWP to acquire or hold a conservation easement.

Discussion

Title 87

Mont. Code Ann. § 87-1-209, **Acquisition and sale of lands or waters**, subsection (1) provides:

> Subject to *87-1-218* and subsection (8) of this section, the department, with the consent of the commission or the board and, *in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners*, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.

(Emphasis added). Mont. Code Ann. § 87-1-218, **Notice of proposed land acquisitions**, subsection (1) requires that, "For *all land acquisitions* proposed pursuant to 87-1-209, the department shall provide notice to the board of county commissioners in the county where the proposed acquisition is located." (Emphasis added). Among other things, this notice "must include"

> an *estimate of the property taxes payable on the proposed acquisition* and a statement that if the department acquires the land pursuant to *87-1-603*, the department would pay a sum equal to the amount of taxes that would be payable on the county assessment of the property if it was taxable to a private citizen....

Mont. Code Ann. § 87-1-209(3)(c) (emphasis added). Notably, by statute, the Department does not pay taxes on conservation easements. *See* Mont. Code Ann. § 76-6-208(1). It does, however, pay taxes on those properties it owns in fee.

Mont. Code Ann. § 87-1-603 uniformly speaks of the Department "owning" or "purchasing" land and also sets out various guidelines for the Department when paying taxes. It also provides exceptions to when the Department must pay taxes.

Read together, §§ 87-1-209, 87-1-218, and 87-1-603 provide insight into the meaning of the reference in § 87-1-209 to "land acquisition." Both -209 and -218 refer to "land acquisition" by the Department. Section -218 further requires a notice be sent to counties for Department "land acquisitions." Those notices "must" include an estimate of property taxes to be paid on the "proposed acquisition." As indicated above, by statute, the Department does not pay taxes on its conservation easements. It does pay taxes on its fee properties. Consistent with this reading, § -603 spells out circumstances under which the Department pays taxes on properties it "owns" or is "purchasing." The implication from these statutes is that "land acquisition" means property the Department owns or is purchasing in fee and is, thus, obligated for payment of taxes. Indeed, if "land acquisition" meant something less than fee title, why would the Department be required in § -218 to provide an estimate of property taxes payable on the property in its notice to the county?

This is also consistent with a plain reading of § 87-1-301, which sets forth the powers and duties of the Commission and which provides that the Commission, "shall approve *all acquisitions* or transfers *by the department of interests in land* or water...." The Legislature explicitly gave the Commission broader responsibility vis-à-vis Department acquisitions than it gave the Land Board. The Commission must approve "*all* acquisitions... of *interests* in land...." This includes all means of acquiring property interests set out in § 87-1-209, including "purchase, lease, agreement, gift, or devise and... easements upon lands...." It spans the range of outright fee title to something less such as a lease.

The Land Board's responsibility, however, is a subset of this, limited only to "land acquisition involving more than 100 acres or $100,000 in value." Basic rules of statutory construction dictate that where the Legislature uses different language, it must be assumed it was done so deliberately. Thus, while the Commission must approve "all acquisitions... of interests in lands...," the Land Board is limited to only actual "land acquisition" and only where such acquisition is "more than 100 acres or $100,000 in value." And, as discussed above, the strong implication in §§ 87-1-218 and -603, is that "land acquisition" means property which the Department "owns" or "purchases" and on which it pays taxes. This does not include conservation easements.

Legislative History

There is no Montana caselaw addressing this question. The legislative history of § 87-1-209, however, reinforces the idea that "land acquisition" means fee title purchase.

In 1981 the Legislature amended § 87-1-209, adding the language at issue here: "in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners(.)" During the session, there were two competing bills, both of which attempted to provide additional oversight of the Department's land acquisitions. HB 251 would have amended § 87-1-209 to grant approval authority to the Legislature for Department land acquisitions. As Rep. Aubyn Curtiss testified, both bills were a result of the "deep concern many

Montanans share over the continual erosion of our tax base, brought about by land acquisition policies of the Department of Fish, Wildlife and Parks." S. State Admin. Comm. Testimony of Rep. Curtiss (March 6, 1981). According to Rep. Curtiss, HB 251 was necessary because "the latitude given this Department to *buy* and sell *real estate* has not been in the best interest of Montana taxpayers, nor has it enabled the Department to better manage Montana's wildlife." *Id.* (emphasis added).

HB 251 failed, in large part because legislative oversight was impractical with the Legislature only convening every two years. In its place, HB 766 passed, granting the Land Board oversight for Department land acquisitions. Noting that the bill had been coming before the Fish and Game Committee for years, Chairman Ellison explained, "There is a reason. People want some elected official to take responsibility of land purchases." H. Fish and Game Comm. Minutes (February 19, 1981). Initially HB 766 assigned oversight to the governor. It was later amended to give that oversight to the Land Board.

HB 766 passed over opposition from FWP and Governor Schwinden. Larry Fasbender, on behalf of the governor, voiced opposition, explaining that, "This bill politicizes the purchase of state lands." S. State Admin. Comm. Minutes (March 20, 1981). FWP Director Jim Flynn testified that while, "The problem this bill seeks to address is the claimed excessive purchase of land by the Department of Fish, Wildlife and Parks," in fact, "The department does not purchase these lands without due consideration." *Id.* (enclosed testimony). Flynn further explained that, "The department is not going to have a major budget for large land purchases in the upcoming biennium, but to the extent that a willing seller appears with the potential for protecting wildlife habitat and providing fishing and other recreational opportunity... this bill will add to the bureaucracy necessary in making that acquisition." Senator Hammond noted that "the problem is that this bill points to the fact that it is necessary for the fish and game to own land. Why cannot they lease land and leave it on the tax rolls(?)." *Id.* Director Flynn "concurred that possible leasing will have to be investigated." *Id.*

Other Statutory Authority

The conservation easement statutes in Title 76 also refer to conservation easements as "interests in land," rather than outright "land acquisition." For instance, Mont. Code Ann. § 76-6-201 provides: "Where a public body acquires under this chapter *an interest in land less than fee*, this acquisition shall be by conservation easement." Likewise, § 76-6-207 requires conservation easements to be recorded in the same county where the property lies, "so as to effect the land's title in the manner of other conveyances of interest in land...." Similarly, in the Open-Space Land and Voluntary Conservation Easement Act, which authorizes public bodies to acquire conservation easements, the Legislature found "*the acquisition* or designation *of interests and rights in real property*," was in the public's interest. Mont. Code Ann. § 76-6-102(2)(f). The Act itself defines conservation easements as:

> an easement or restriction, running with the land and assignable, whereby an *owner of land voluntarily relinquishes* to the holder of such easement or restriction *any or all rights* to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character

> of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

Mont. Code Ann. § 76-6-104(2) (emphasis added). This definition of conservation easements follows the Montana Supreme Court's characterization of easements generally as, "[A] non-possessory interest in land, 'a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon land.'" *Kuhlman v. Rivera*, 216 Mont. 353, 358, 701 P.2d 982, 985 (1985) (discussing right-of-way easements).

Reading the statutes in this manner also brings them in line with the constitutional role and duties of the Land Board, which is to maximize income to the state from school trust lands. Consistent with this, § 77-1-202 makes clear that:

> The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:
> (a) secure the largest measure of legitimate and reasonable advantage to the state; and
> (b) provide for the long-term financial support of education.

Land held by the Department, however, is subject to a different set of statutory directives, as provided in § 87-1-209:

> (a) for fish hatcheries or nursery ponds;
> (b) as lands or water suitable for game, bird, fish, or fur-bearing animal restoration, propagation, or protection;
> (c) for public hunting, fishing, or trapping areas;
> (d) to capture, propagate, transport, buy, sell, or exchange any game, birds, fish, fish eggs, or fur-bearing animals needed for propagation or stocking purposes or to exercise control measures of undesirable species;
> (e) for state parks and outdoor recreation;
> (f) to extend and consolidate by exchange, lands or waters suitable for these purposes.

None of FWP's statutes direct the Department to derive income from the property.

Conclusion

Reading FWP's statutes, in conjunction with the conservation easement statutes, leads not only to the conclusion that conservation easements are "interests in land," but also that the Legislature made an intentional distinction between "interests" and outright "land acquisition." Reading these statutes against the backdrop of the Land Board's authority to manage state lands to

maximize income to the trust, leads to the conclusion that § 87-1-209 does not require the Department to obtain Land Board approval for conservation easements.

OFFICE OF THE GOVERNOR
STATE OF MONTANA

STEVE BULLOCK
GOVERNOR

MIKE COONEY
LT. GOVERNOR

September 10, 2018

The Honorable Tim Fox
Attorney General
Department of Justice
Joseph P. Masurek Justice Bldg.
215 North Sanders
Helena, MT 59620-1401

Attorney General Fox:

I have received the draft Attorney General opinion regarding conservation easements. Enclosed with this letter are formal, legal comments prepared by my Chief Legal Counsel. In this cover letter, I want to share a few comments from my perspective as a decade-long member of the Land Board and as a former Attorney General.

After the Land Board denied one Fish and Wildlife Commission-approved conservation easement and indefinitely postponed another, I am concerned that Land Board's actions are undermining the predictability and certainty that private property owners expect when dealing with our state, and in the process risking public access opportunities for hunters and recreationists. The Land Board's main role is to oversee the control and disposition of trust lands for the benefit of schools. Under the constitution, it is not the Land Board's job to weigh in on every property transaction entered into by the State of Montana.

After a particularly egregious delay this year—one that undermined a family that had devoted two years of work and investments to making a good deal for the public and public access—I directed my staff to study whether the Land Board is legally required to approve Montana Department of Fish, Wildlife & Parks (FWP) conservation easements. Following a careful review of the constitution and state law, I determined that FWP conservation easements do not legally require approval by the Land Board.

The law is clear: FWP conservation easements are complete when the Fish and Wildlife Commission votes to approve them. Though it has been FWP's practice to seek an additional vote by the Land Board, the additional process is not required by the law.

I am concerned, then, that the draft opinion you circulated seeks to amend the law to require Land Board approval—to match what FWP used to do, but not what the law requires.

It's wrong on the law. Moreover, I believe it poses a significant threat to private property rights, to families involved in the Habitat Montana program, and to sportsmen and women who rely on conservation easements for access. I have no doubt that litigation will ensue if this opinion becomes final.

Traditionally, politics have taken a back seat at the Land Board. It's unfortunate that recent events have made conservation easements so unpredictable for families that have worked with FWP for years. Because Land Board approval is not legally required, I decided not to put private property owners through an additional bureaucratic and politicized process that could risk everything—tens of thousands of dollars in landowner investment, carefully planned real estate transactions and estate planning by families, and federal funding sources that would be diverted to other, out-of-state projects. The old process worked for many years, but recent changes at the Land Board undermined that process. I won't put families through it, or waste public resources, if it isn't required.

Conservation easements are an important tool for keeping agricultural land in families, rather than sold off to large corporations or other moneyed interests. They promote sportsman access, too, providing valuable hunting, fishing, and recreation opportunities that make Montana the envy of the world. In short, they're an important public-private partnership that means a lot to Montanans—property owners and sportsmen alike. I'll fight for them, and I won't subject landowners to an unpredictable political process that the law does not require.

To that end, I hope that you are seeking input from a broad range of stakeholders as you consider this opinion, including sportsmen and women, private property owners, and others who fear the "chilling effect" on conservation easements that Senate President Sales referenced in his opinion request to you.

Finally, I note that the guidelines for an Attorney General opinion—guidelines that I also followed as Attorney General—state that an Attorney General opinion is not appropriate for "matters that will likely result in litigation."[1] Because litigation is certain to result if you issue the opinion with its proposed conclusion, I urge you to follow these guidelines and decline to issue an opinion that would add a requirement not present in current law.

I will continue to lead on this issue and fight to expand public access to our lands, rivers, and streams, even when others choose to jeopardize access and the rights of property owners with politics. Thank you again for sharing the draft. Please feel free to reach out to me with any further questions or concerns.

Sincerely,

STEVE BULLOCK
Governor

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[1] Office of the Attorney General, "Guidelines for Opinion Requests," *available at* https://dojmt.gov/agooffice/guidelines-for-opinion-requests/

OFFICE OF THE GOVERNOR
STATE OF MONTANA

STEVE BULLOCK
GOVERNOR

MIKE COONEY
LT. GOVERNOR

September 10, 2018

Rob Cameron
Department of Justice
Joseph P. Masurek Justice Bldg.
215 North Sanders
Helena, MT 59620-1401

Dear Rob:

On behalf of Governor Bullock, thank you for soliciting comment on the draft Attorney General opinion about conservation easements. This letter briefly outlines the Governor's perspective on the legal question presented by Senator Sales and the proposed answer in your draft.

In summary, the Governor has serious concerns about the draft opinion and its analysis of the law. If the draft opinion is finalized in its present form, there is a high likelihood that a reviewing court will reach the opposite conclusion and set it aside.

Department of Fish, Wildlife & Parks (FWP) conservation easements are complete when they receive approval from the Fish and Wildlife Commission (Commission). A second approval by the Land Board is not required under the law. The statute Senator Sales refers to, § 87-1-209, MCA, only requires approval from the Land Board for "land acquisitions." As discussed below, a conservation easement is not a "land acquisition" because the holder of the easement doesn't acquire any land. Thus, the statute requiring Land Board approval for "land acquisition" does not apply to FWP conservation easements.

1. Background on FWP conservation easements

This spring, Governor Bullock directed FWP to determine what state approvals are required to finalize FWP conservation easements. Based on that review, the Governor determined that FWP conservation easements are complete upon approval from the Fish and Wildlife Commission. Historically, FWP also sought a second approval for its conservation easements from the Land Board. The question Senator Sales poses is, in essence, whether the practice of seeking a second approval is required by the law. It does not appear that this legal question has been asked or answered prior to issues around the Horse Creek Conservation Easement this year.

In Montana, conservation easements are enabled by statute. Section 76-6-104(2), MCA defines a conservation easement as,

> an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

Conservation easements are "interests and rights in real property," as opposed to real property itself. *See* § 76-6-102(2), MCA.

FWP conservation easements in the Habitat Montana program undergo a long, intensive public process, including environmental analysis and public comment, before they are approved. The Fish and Wildlife Commission is an appointed body that includes public members, much like the other boards that provide for public participation in state government. Typically, a private property owner proposing a conservation easement begins the process by working with FWP regional staff. If the project is promising for the public, the Commission gives the project an initial endorsement for further work. After that, the property owner may invest years of work and thousands of their own dollars negotiating a prospective conservation easement with FWP. Some projects fail at this stage. Those that don't fail return to the Commission for additional public comment, deliberation, and a final public vote.

On most matters, the Land Board has a different function than the Fish and Wildlife Commission. Under the constitution, the primary role of the Land Board is to oversee the responsible sale of state trust lands to benefit public schools. The Land Board does not weigh in every time the state enters into property relationships—like leasing a right of way for the Department of Transportation, or buying land for a machine shop, unless those conveyances impact state trust lands.

2. <u>The law does not require a second approval for FWP conservation easements from the Land Board</u>

   a. *The text of § 209 does not apply to FWP conservation easements*

A conservation easement is an "interest in land." Section 76-6-102, MCA. Because the Fish and Wildlife Commission "shall approve all acquisitions or transfers by [FWP] of *interests in land* or water," Commission approval is required for FWP conservation easements. Section 87-1-301(e) (emphasis added). This completes the process of state approvals for conservation easements under the law.

Senator Sales has asked whether § 87-1-209, MCA legally requires a second round of approval for FWP conservation easements before the Land Board. Section 209 requires approval by the Land Board only "in the case of land acquisition."

As discussed above, conservation easements are not "land acquisition." The holder of a conservation easement does not acquire any land. Rather, the holder obtains a negative restriction on land against development. The original private property owner still owns the land under the conservation easement, pays taxes on it, and continues to hold and physically occupy the property. The property owner retains all rights in the property except for those explicitly granted to the holder of the conservation easement.

By contrast, in a land acquisition, the new owner actually "acquires" the land itself, along with the other rights and responsibilities of land ownership: the responsibility to pay taxes, the right to hold and occupy the property, and so forth. Consequently, by its plain text § 209 does not apply to FWP conservation easements because they do not involve land acquisition.

Nonetheless, the draft opinion concludes that the second round of approvals under § 209 includes FWP conservation easements. Respectfully, the analysis and proposed conclusion is inconsistent with the statute.

First, and most plainly, the proposed conclusion is at odds with the statute's text: a conservation easement is not a land acquisition. No land is acquired. Rather, it makes sense to refer to conservation easements as "interests in land," as Title 76 of the Montana code does. This alone excludes conservation easements from the scope of § 209's requirement for Land Board approval.

Second, the proposed conclusion violates fundamental rules of statutory construction. To reach its proposed holding, the draft opinion concludes that the scope of approval authority for the Fish and Wildlife Commission and the requirements for Land Board approval in § 209 are essentially the same—even though the two statutes use different terms. Under this argument, "land acquisition" and acquisition of an "interest in land" mean the same thing. *See* ¶¶ 8-9 of the draft opinion. This violates the rule of statutory construction that "[b]ecause the enacting Legislature did not use identical language in the two provisions, it is proper for us to assume that a different statutory meaning was intended." *Zinvest, LLC v. Gunnersfield Enterprises, Inc.*, 2017 MT 284, ¶ 26, 389 Mont. 334, 342, 405 P.3d 1270, 1276. This conclusion is even more untenable given the fact that the Fish and Wildlife Commission statute, which uses the term "interests in land," specifically references § 209. This cross-reference between the two statutes makes it highly unlikely that the Legislature conflated the term "interest in land" with "land acquisition." *See* § 87-1-301, MCA (reference to § 209).

The legislature did not use the term "interests in land" when it amended § 209 to require Land Board approval for certain transactions. It used something more specific: land acquisition. Respectfully, the draft opinion errs in its suggestion that the two terms are the same. Even then, the argument that the two terms cover the same terrain suffers from faulty logic. The draft opinion makes this argument by reasoning that because it could find no evidence that land acquisition is a term of art, the term must therefore denote any "legally cognizable interest in land." *See* ¶¶ 8-9 of the draft opinion. That logic just doesn't follow: not meaning one thing is not the same as meaning everything. The legislature already has a term for any "legally cognizable interest in land"—the term "interest in land." It declined to use that term in § 209. The two terms cannot mean the same thing, yet the draft opinion relies on this mistake of interpretation to make its determination.

The plain text of the statute answers the question presented by Senator Sales. A conservation easement does not involve land acquisition. Thus, the requirement that the Land Board offer its approval to "land acquisitions" of a certain size or expense does not apply to FWP conservation easements.

b. The legislature did not intend to include FWP conservation easements when it amended § 209

The legislative history of § 209 makes it even clearer that the legislature did not intend to require Land Board approval for FWP conservation easements.

The legislature added references to the Land Board in 1981. The amendments were a response to legislative concerns that public land purchases might reduce the tax base for local governments. Hearings and testimony focused on FWP land purchases, in which FWP bought real property outright—turning private, taxable land into public land. In the legislature's judgment, an additional level of political approval should be required before FWP took actions that might remove land from the local tax base. Eventually, the bill passed, adding the requirement for Land Board approval for "land acquisition" present in § 209 today.

The legislature's obvious concerns over local taxation make it difficult to conclude that the legislature intended for conservation easements to be within the 1981 amendments to § 209. Conservation easements have nothing to do with local taxation. For one, conservation easements have no effect on local taxes—private property owners continue to own and occupy their land and must still pay taxes on land with a conservation easement attached. Second, at the time of the 1981 amendments, conservation easements were relatively obscure. FWP had only completed a single conservation easement at that time, the year before.

Even so, the draft opinion concludes that the legislature's changes in 1981 were intended to require Land Board approval for FWP conservation easements. In reaching this conclusion, the draft opinion cites testimony on a different bill in 1981 in which the then-director of FWP mentions conservation easements. Respectfully, it appears the draft opinion overstates the importance of this testimony within the broader scope of legislative history. The citation is to the pre-written testimony of a single opposition witness on a bill that failed—not by a sponsor or an elected member of the House or Senate, or on the operative bill that accounts for the language now present in § 209.[1] More importantly, even on that failed bill, other witnesses made it clear that their motivating concern was FWP land purchases. The Montana Petroleum Association, for example, testified that "land purchases should be made by the legislature," as its reason for supporting the bill. The Montana Wildlife Federation referred to "the tax issue." Trout Unlimited referred to "land purchase." The sponsor, Representative Curtiss, was even more clear about her intentions with the bill:

> House Bill 251 is no stranger to those of you who have before served on the committee, and in the state legislature. It is before you again, because of the deep concern many Montanans share over the continual erosion of our tax base, brought about by land acquisition policies of the Department of Fish, Wildlife and Parks.

[1] Director Flynn testified on House Bill 251, which failed. House Bill 766 passed.

(emphasis added). Testimony on that bill focused on land acquisition by FWP in the form of traditional purchases and their effects on the tax base. The draft opinion's conclusion on the legislative history is based almost entirely on one sentence by FWP's director in nearly four pages of his testimony, and many more regarding the legislature's focus on local taxes.

All told, it is difficult to conclude that the sponsor or other voting members had conservation easements in mind for either bill in 1981: both because of how new and uncommon conservation easements were, and also because they simply have nothing to do with the cited tax problem. Accordingly, the legislative history for both bills in the 1981 session weighs heavily in favor of the conclusion that the legislature did not intend to include tax-neutral conservation easements in the added-process requirement now contained in § 209. If anything, the focus on local taxation offers a reason why the legislature used the more limited term "land acquisition" when noting the Land Board's role in § 209, as opposed to the more all-encompassing term "interests in land" found elsewhere in Montana code: the former denotes tax-implicating purchases of real property outright, and the other is broader, referring to a variety of real estate transactions.

c. The remainder of the draft opinion relies on inapposite authorities to reach its conclusion

Within the draft opinion, there is no further evidence that the legislature deliberately conflated the terms "land acquisition" and "interests in land" to require Land Board review of FWP conservation easements.

Use of the phrase "land acquisition" in other contexts and jurisdictions, for example, says very little about why the Montana legislature decided to employ the term in Montana law, and declined to use the phrase "interests in land." Moreover, none of the cases cited deals with statutory interpretation of the term "land acquisition" or otherwise reaches a legal conclusion as to the definition of "land acquisition."

Likewise, the extended discussion of FWP's past practices says very little about the actual meaning of the statute. An agency's practices cannot change the meaning of a statute's text. The law is also clear that agencies retain the ability to examine their processes and refine them to better conform with the law. As discussed above, it was not until this year that the question arose as to whether FWP's practice of seeking a second approval was required by the law. Much of the discussion in this section of the draft opinion appears to address a separate, policy discussion about whether FWP *should* seek a second approval. That discussion is separate from what the plain text of the statute requires and what the legislature intended when it added references to the Land Board in 1981.

In sum, the plain text of § 209 is at odds with conclusion proposed by the draft opinion. To understand the scope of the restriction in § 209, the analysis must begin with a plain reading of the text of the statute itself. The purchase of real estate outright, for example, is almost certainly a land acquisition because it involves the acquisition of land. A conservation easement is not a land acquisition because the holder only has a negative restriction against development—no land is acquired.

3. The draft opinion may have unintended consequences for private property rights and for the future of conservation easements in Montana

Legal review of the draft opinion has identified two additional areas that may see significant, unintended effects if the draft opinion is finalized in its current form.

First, it appears that the draft opinion may inadvertently conflate the law of easements with the law of conservation easements. These two types of property interests are different and draw from different histories and bodies of governing law. A conservation easement is distinguishable from a typical easement on land because conservation easements entail a negative restriction on development. Easements generally, on the other hand, can have any range of conditions for use of property—like the right to use and occupy a right of way. Setting aside the issue of Land Board approval of FWP conservation easements, there may be other stakeholders significantly affected by a binding Attorney General opinion that draws these two bodies of law together interchangeably. There is a substantial risk that the draft opinion, if finalized, could unsettle private property relationships for these third-parties and have other, unknown implications for property transactions and private land conservation efforts around the state.

Second, the Governor is deeply concerned about the effect the proposed opinion would have for other landowners presently pursuing conservation easements in partnership with Fish, Wildlife & Parks, and for future conservation efforts through the Habitat Montana program. If finalized in its present form, the draft opinion risks creating additional legal and procedural uncertainty for property owners. This could have the effect of stifling future interest in the Habitat Montana program and undermining years of partnerships between sportsmen and women and working landowners to protect public access and wildlife habitat.

While the Governor appreciates the Attorney General's past action in support of these values, he finds the potential outcomes of this opinion irreconcilable and in direct conflict with the legislative direction given to Fish, Wildlife & Parks for implementing the Habitat Montana Program.

This concludes the Governor's comments. The Governor is grateful for the opportunity to review and comment on the draft opinion. Please do not hesitate to reach out to me if you have any questions or require further discussion on this matter.

Sincerely,

Raph Graybill
Chief Legal Counsel
Office of the Governor