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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

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

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

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.