

CLERKS - Provision of the Open-space Land and Voluntary Conservation Easement Act delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

COUNTIES - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review do not apply to conservation easements acquired or created by the United States under federal law;

LAND USE - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

PUBLIC LANDS - Provision of the Open-space Land and Voluntary Conservation Easement Act dictation duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

STATUTORY CONSTRUCTION - Where meaning of statute is unclear, construction that avoids potential constitutional infirmity is preferred;

MONTANA CODE ANNOTATED - Title 76, chapter 6; sections 1-3-232, 70-21-201, 76-6-103(1), -104(4), -105(2), -202, -206, -207;

UNITED STATES CODE - 16 U.S.C. § 3837b(2);

HELD: Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

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Mr. Joe Coble  
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Dear Mr. Coble:

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

Do the requirements of Mont. Code Ann. §§ 76-6-202, 76-6-206 and 76-6-207 apply to agencies of the federal government?

**[P2]** Montana Code Annotated Title 76, chapter 6, the “Open-Space Land and Voluntary Conservation Easements Act” (the Act), deals with the creation, recognition and enforcement of conservation easements. Among other things, it authorizes “public bodies” and “qualifying private organizations,” both terms defined by the Act, to participate in transactions creating a conservation easement. Mont. Code Ann. § 76-6-103(1). However, it is not the only means by which an easement preserving open space will be recognized or created, as it is clear that the Act does not intend to occupy the field of “easement[s], covenant[s], condition[s], or restriction[s].” Mont. Code Ann. § 76-6-105(2).

Federal agencies also participate in the creation of conservation easements under the authority of federal statutes. See, e.g., 16 U.S.C. § 3837b(2) (creation of easements by U.S. Fish and Wildlife Service).

**[P3]** The Act defines the terms “public body” and “qualified private organization” in ways that exclude their application to the federal government. Mont. Code Ann. § 76-6-104(4) (“‘Public body’ means the state, counties, cities, towns, and other municipalities.”); (5) (defining “Qualified private organization” as a non-governmental entity). Accordingly, those provisions of the Act specifically relating to public bodies and qualified public organizations cannot be extended to a federal agency based on the plain language of the definitions.

**[P4]** This analysis does not completely answer your question, as there are three provisions of the Act that do not expressly contain language either specifically referring to those defined terms or otherwise limiting the reach of that specific section to the Act:

1. Montana Code Annotated § 76-6-202 limits the duration of conservation easements to a minimum of fifteen years and provides that any such easement not created in perpetuity may be renewed for a minimum term of fifteen years.
2. Montana Code Annotated § 76-6-206 provides that “all conservation easements” must be subject to review and advisory comment by the local planning authority for the county. Although that review is not binding, the easement cannot be recorded until the review is complete or 90 days have elapsed.
3. And, Mont. Code Ann. § 76-6-207 provides that the easement is to be recorded in the county where the land lies in the same way that other property documents are recorded, see Mont. Code Ann. §§ 70-21-201 et seq. (generally describing recordation of real property documents).

[P6] Your questions are specific to the operation of Mont. Code Ann. §§ 76-6-202, -206 and -207, and whether those apply to the federal government.

[P7] Even though those three provisions do not contain language expressly limiting their application to the Act, I conclude that those provisions only apply to those easements created under the Act. I reach that conclusion for three reasons. First, given that the legislature understood that other laws might exist providing for the preservation of open space, and specifically intended to respect those laws, it is highly unlikely that it would have limited the reach of almost, but not quite, all of the Act only to conservation easements created under it, while attempting in a few sections to regulate other kinds of such easements. Second, basic canons of construction provide that “[s]tatutes are not to be read in isolation, but as a whole.” In re Adoption of K.P.M., 2009 MT 31, ¶ 14, 349 Mont. 170, 201 P.3d 833. And finally, it is hard to reach any other conclusion in light of the savings clause found in Mont. Code Ann. § 76-6-105(2).

[P8] Accordingly, just as these provisions do not apply to easements created under other provisions of state law, they also do not apply to easements created under federal law. The latter interpretation also has the benefit of avoiding potential conflict with federal law. It is well-established that where two interpretations of a law are available, one of which presents a potential constitutional issue and the other of which does not, the construction that avoids the constitutional issue is to be preferred. Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, ¶¶ 25-27, 297 Mont. 448, 992 P.2d 244;

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Mont. Code Ann. § 1-3-232 (an interpretation that gives effect is to be preferred over one that renders void).

THEREFORE, IT IS MY OPINION:

Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

Sincerely,

STEVE BULLOCK  
Attorney General

sb/cdt/jym