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VOLUME NO. 57 OPINION NO. 4

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 70-17-102(1), 70-17-111(2), 76-6-104(2), 76-6-201(1), 76-6-203, 76-6-206, 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.

October 15, 2018

President Scott Sales
P.O. Box 200500
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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; two memoranda supplied by FWP dated March 23 and July 31, 2018; written comments from the Office of the Governor dated September 10, 2018; and written comments from the Springhill Ranch, Wibaux, dated September 11, 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. The Law of Easements in Montana

A. Easements Generally

[P4] Under Montana law, "[a]n easement is a nonpossessory 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 the land." *Walker v. Phillips*, 2018 MT 237, ¶ 12, ___ Mont. ___, ___ P.3d ___ (Sept. 25, 2018) (quoting *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84), *see also Ganoung v. Stiles*, 2017 MT 176, ¶¶ 14-15, 388 Mont. 152, 398 P.3d 282. The former is referred to as a positive easement; whereas, the latter is a negative easement.

> [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)).

B. Conservation Easements

[P5] In *Scott v. Lee & Donna Metcalf Charitable Trust*, the Montana Supreme Court recognized two types of easements that preserve conservation values: 1) those created under Montana's Open-Space Land and Voluntary Conservation Easement Act, which the Court referred to as "a Title 76, Chapter 6, MCA conservation easement"; and 2) servitudes created for conservation purposes under Mont. Code Ann. § 70-17-102(7) ("the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land"). 215 MT 265, ¶ 10, 381 Mont. 64, 358 P.3d 879.

[P6] A conservation easement under Title 76 is

> 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). A conservation easement is properly characterized as a negative easement; *i.e.*, "one the effect of which is . . . to preclude the owner of the land subject to the easement from doing that which, if no easement existed, he would be entitled to do." *Conway v. Miller*, 2010 MT 103, ¶ 17, 356 Mont. 231, 235, 232 P.3d 390, 395 (quoting *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 301, 66 P.2d 792, 794 (1937)).

[P7] The primary purpose of a conservation easement is to preserve the natural character of the land by precluding and\or restricting the owner from engaging in certain

specified activities. *See* Mont. Code Ann. § 76-6-203 (listing the types of prohibitions a conservation easement may impose, including acts detrimental to conservation, and acts or uses detrimental to such retention of land or water areas in their existing conditions).

[P8] The grant of a conservation easement may, and often does, include affirmative easements or servitudes in support of the negative easement. In the case of FWP Conservation Easements, these typically include the right of public recreational access for activities such as hunting, trapping, and wildlife viewing. *See, e.g.*, Mont. Code. Ann. § 70-17-102(1) ("[L]and burdens or servitudes upon land may be granted and held though not attached to land" and may include "the right of . . . fishing and taking game.").

C. Applicability of General Easement Law to Conservation Easements

[P9] FWP and the governor's office have commented and assert, with no citation, that easements and conservation easements are fundamentally different types of property interests, thereby suggesting that general laws pertaining to easement would not apply in conservation easement analysis. On the contrary, as should be obvious from its name, the conservation easement is a specific type, or sub-set of easements, and not a different, unique type of property interest altogether. As discussed below general easement law readily applies to conservation easements to the extent general law has not been pre-empted by the Open-Space Land and Voluntary Conservation Easement Act.

[P10] As noted above, conservation easements are a type of negative easement, which is neither new nor novel in Montana. *See, e.g., Conway* at ¶ 27 (developer's "building restriction line" on plat sufficient to create a negative easement restricting building location); *Haggerty v. Gallatin County*, 221 Mont. 109, 119-20, 717 P.2d 550, 556-57 (1986); (concluding that commercial-use restriction covenant, or "negative easement," on conveyed ski-area property was enforceable); *Reichert v. Weeden*, 190 Mont. 95, 100-102, 618 P.2d 1216, 1219-20 (1980) (agreement between property owners restricting operation of tavern construed as an enforceable "negative easement" that ran with the land); and *Northwestern Improvement Co.,* 104 Mont. at 302, 66 P.2d at 795 (recognizing enforceable "restrictive covenants" contained in a deed that prohibited subsequent purchasers of conveyed lot from using premises for the sale of "vinous, spirituous or fermented liquors as a beverage, nor for gambling, nor for any immoral purpose" under negative easement analysis).

[P11] Thus, the fact that conservation easements, in substantial part, prohibit rather than authorize uses of real property is not remarkable; and does not transmogrify the conservation easement into a new, unique species of property interest. Hence, unless a specific provision of conservation easement law provides otherwise,[1] the laws and legal principles pertaining to easements generally apply with equal force to conservation easements and are therefore instructive with respect to the issue at hand.

[P12] As the Montana Supreme Court explained in *Colarchik v. Watkins*, an easement is not only an interest in property, "an easement ***is property*** in the sense that it cannot be taken for public use without just compensation." 144 Mont. 17, 22, 393 P.2d 786, 789 (1964) (emphasis added); *see also Searight v. Cimino*, 230 Mont. 96, 100, 748 P.2d 948, 950 (1988) ("[a]n easement is a property right protected by the constitutional guarantee against the taking of private property without just compensation."). Accordingly, under the property law of Montana, an "easement acquisition" is a real property acquisition, which in turn reflects that an easement acquisition is a "land acquisition" under principles of many decades of Montana property law. No provision of Montana's Open-Space Land and Voluntary Conservation Easement Act precludes or preempts application of this principle to the sub-set of easements referred to as conservation easements.

1. Plain Meaning of "Land Acquisition"

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

[P13] 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).

[P14] "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.

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[1] For example, Title 76, Chapter 6, Part 2 of the Montana Code Annotated imposes requirements on conservation easements that do not apply to other types of easements (*e.g.*, Mont. Code Ann. § 76-6-206 (requiring submission to local planning authority for comment)).

Consequently, we turn to well established rules of statutory construction to ascertain the legislature's intent for its meaning.

[P15] 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. Department 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.

[P16] 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.

[P17] "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.

[P18] While one may speak of "acquiring land," from a property law perspective, it would be more accurate to use the phrase, "acquiring an interest in land." To be precise with property law terminology and concepts, one does not acquire land; one acquires one

or more specifically defined interests in land. Property law students and practitioners are familiar with the "bundle of sticks" analogy: the view that "property" is a bundle of discrete rights associated with a thing, such as the rights of usage, exclusion, alienation, access, and alteration. *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 147, 348 Mont. 80, 201 P.3d 8 (Nelson, J., dissenting). Because one acquires an interest in land, under well-established property law principles, the term "land acquisition" should properly be viewed as a shorthand way of indicating "acquisition of an interest in land."

[P19] 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."

[P20] 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.).

[P21] 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 not accurate.

[P22] Moreover, while a non-possessory negative easement does not, in itself, convey an affirmative right to the grantee to use the land, such easements convey to the grantee the significant right ***to control the use*** of the entire property, and to enforce prohibitions on use as set forth in the easement in perpetuity. In certain circumstances, the right to control the use of the entire parcel of land in perpetuity can be viewed as a right superior, and of greater value, to the remaining possessory rights of the fee title holder. This is evidenced by the fact that the appraised value of the conservation easement itself can be significantly greater than the appraised value of the fee title holder's remaining interest after the easement is conveyed.[2]

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.

[P23] 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

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[2] For example, the land subject to the Horse Creek Complex Easement had a "Before Easement Value" of $10,148,000; and an "After Easement Value" of $3,998,000. This established the value of the Easement at $6,150,000, an amount $2.15 million greater than the fee title holder's remaining interest in the land.

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.

[P24] 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."

[P25] 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).

[P26] 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.

[P27] 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."

[P28] 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.

[P29] 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

[P30] 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); *McLennan v. United States*, 24 Cl. Ct. 102, 104 (U.S. Cl. Ct. 1991) (recognizing conservation easement as a "land acquisition" project); *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").

[P31] Similarly, scholars routinely recognize the acquisition of a conservation easement as a "land acquisition." *See, e.g.*, Symposium of Waterbanks, Piggybanks, and Bankruptcy, 83 Tex. L. Rev. 1941, 1943 (recognizing two types of "land acquisitions:" (1) "full-fee" based, and (2) "conservation-easement-based"); Local Land Trusts: A Comparative Analysis in Search of an Improved Template for Land Trusts, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 767, 786 (discussing organizations that rely on "conservation easements as a main mechanism for ***land acquisition***") (emphasis added); 1 Environmental Law Practice Guide CHAPTER 3.syn (2018) (recognizing that "the conservation easement plays a central role in ***land acquisition*** programs") (emphasis added); The Beach Zone: Using Local Land Use Authority to Preserve Barrier Islands, 20 Pace Envtl. L. Rev. 299, 314 ("Conservation easements are another ***land acquisition measure*** that restrict development in scenic and environmentally sensitive areas.").

[P32] These authorities, though not controlling, support the conclusion that the plain meaning of "land acquisition" includes acquisition of easements.

[P33] 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

[P34] 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. Additionally, I acknowledge the possibility that a court could determine the term "land acquisition" as used in Mont. Code Ann. § 87-1-209(1) to be ambiguous. Relevant legislative history is set forth below.

a. 1981: HB 251 and HB 766.

[P35] 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.

[P36] 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.

[P37] 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).

[P38] 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 all acquisitions by the department regardless of the purpose for acquisition.***
>
> ***The department's acceptance of conservation easements 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 thereby 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.[3]

[P39] 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

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[3]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 . . . For purposes of this testimony, please consider the information presented on HB 251, 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).

Land Board for conservation easement acquisitions in compliance with the statute for the next 37 years.

b. 1987: HB 526 (Habitat Montana)

[P40] 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).

[P41] 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.

[P42] 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.

[P43] 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.

[P44] 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****.*

[P45] In the final Decision Notice for the Horse Creek Easements, Brad Schmitz, FWP Region 7 Regional Supervisor stated:

> After review of this proposal, it is my decision to accept the draft EA as supplemented by this Decision Notice and changes herein as final, and to recommend proceeding with the proposed Horse Creek Complex Conservation Easement, ***contingent on approvals by the Fish & Wildlife Commission and the Montana Board of Land Commissioners***

Decision Notice – Horse Creek Complex Conservation Easement at 11 (Jan. 25, 2018).

[P46] 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, and 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****.*

[P47] 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.***"

[P48] 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.***"

[P49] 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.

[P50] 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).

[P51] 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." *Montana Power Co. v. Montana. 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.

[P52] 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.

[P53] 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."

[P54] The remarkable suggestion that FWP has sought Land Board approval for every conservation easement since 1981 as a mere courtesy is simply unsupportable.

* * *

[P55] 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:

> 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