IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP _____

STEVE BULLOCK, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MONTANA; MARTHA WILLIAMS, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS,

Petitioners,

v.

TIMOTHY C. FOX, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MONTANA,

Respondent.

PETITION FOR DECLARATORY RELIEF ON ORIGINAL JURISDICTION

EXPEDITED CONSIDERATION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INDEX OF EXHIBITS

QUESTION PRESENTED

Does the term "land acquisition," as it is used in § 87-1-209(1), MCA, include conservation easements?

I. RELIEF REQUESTED

The Department of Fish, Wildlife & Parks ("FWP") is on the verge of finalizing conservation easements with three private landowners. An Attorney General Opinion ("Opinion") issued last week prevents the State from closing these deals—each of which faces imminent deadlines. The Opinion is incorrect as a matter of law. Nonetheless, it prevents FWP from finalizing the transactions unless this Court provides declaratory relief.

Under the Habitat Montana program, FWP may use fees from hunting licenses to promote open spaces, wildlife conservation, and recreational hunting and fishing access in Montana. Consistent with these efforts, FWP pursues conservation easement deals with private landowners across the State.

At present, there are thirteen conservation easement deals in the process of negotiation and approval. Three of those deals have received the final approval of the Fish and Wildlife Commission ("Commission"). They only require administrative direction from the Governor and FWP to effect closure by transferring funds. Each of these three Commission-approved deals faces a deadline for completion by the end of this calendar year. One must be completed

by November 30.

The three Commission-approved deals would protect a combined total of 18,614 acres of land across the State. FWP will contribute $6,029,600 to these transactions. The federal government will contribute an additional $1,514,400.

FWP conservation easement transactions must be approved by the Commission, which "shall approve all acquisitions or transfers by the department of interests in land or water." Section 87-1-301(1)(e), MCA ("§301"). Conservation easements are "interests and rights in real property." *See* § 76-6-102(2), MCA. For years, conservation easements have also gone before the Board of Land Commissioners ("Land Board"), although Montana law does not mandate it.

A recent Opinion by the Attorney General, however, improperly transforms this past practice into a requirement of the law. Citing § 87-1-209, MCA ("§209"), the Attorney General argues that conservation easements must go before the Land Board because they are a "land acquisition."

The Opinion proceeds on a mistake of law. A conservation easement is simply not a "land acquisition." No land is acquired in a conservation easement transaction. The landowner continues to own her land in fee, occupy it, and pay taxes on it. The Legislature never intended for the phrase "land acquisition" in §209 to apply to FWP conservation easements. A conservation easement is better

described as an "interest in land," a broader term that the Legislature has used elsewhere—but not in §209.

Mistaken though the Opinion is, it binds FWP from proceeding on the three pending conservation easements—and any future Commission-approved easement—until this Court grants appropriate declaratory relief. Accordingly, because the conditions of Montana Rule of Appellate Procedure 14(4) are satisfied, Petitioners respectfully petition for the Court to assume original jurisdiction and declare that the Legislature did not intend to require Land Board approval for FWP conservation easements.

Unless the Court provides relief, the Governor and FWP are prevented from closing on the three Commission-approved conservation easements. Each represents a significant loss to the State if it cannot be completed within the required time.

II. PARTIES

Petitioner, Steve Bullock, is the Governor of the State of Montana. He is the State's chief executive and exercises supervisory authority over FWP pursuant to the Montana Constitution and state statute. He is also president of the Land Board by statute. He petitions the Court in his official capacity.

Petitioner, Martha Williams, is Director of FWP. Director Williams oversees the administration of the Habitat Montana program by which the State of

Montana may negotiate and acquire conservation easements. She petitions the Court in her official capacity.

Defendant, Timothy C. Fox, is the Attorney General of the State of Montana. He is named as Respondent solely in his official capacity.

Private landowners with pending conservation easement transactions are not necessary parties to this Petition. Petitioners only seek declaratory relief to determine what procedures Montana must undertake to finalize its side of these transactions. The rights and obligations of the counterparty landowners are not in question.

III. BACKGROUND

A. The Conservation Easement Process.

Every year landowners approach FWP to propose conservation easements. Typically, the landowners are families with ranch operations. Conservation easements can assist these families with their financial planning while securing open spaces and advancing wildlife conservation for the public.

Conservation easements take years to complete. The process begins by landowners working with FWP regional staff. If a project is promising for the public, the Commission will assess the project and provide an initial endorsement. Next, the landowner may invest years of work and thousands of dollars negotiating a deal. Some projects fail at this stage. Successful projects return to the

Commission for additional public comment, deliberation, and a final public vote.

B. Past Practice for FWP Conservation Easement Approval.

FWP conservation easements were not common before the late 1980s. At least twice during this early period, FWP closed conservation easements following a vote of the Commission. At the time, FWP Director Jim Flynn determined that conservation easements did not require additional approval before the Land Board because conservation easements are not land acquisitions. Departmental correspondence in 1986, for example, records that "[t]he director has determined that, since this [conservation easement] is not an acquisition of land, the matter need not be presented to the State Land Board for approval." Ex.11-1 at *1. In a separate case in 1986, FWP wrote that "it will not be necessary for the State Board of Land Commissioners to approve the [conservation easement] project" where FWP "will not retain fee title to any land." Ex.11-2 at *5.

Official minutes for the Land Board do not reflect consideration of any FWP conservation easements before 1992. At some point during the 1990s, however, FWP began to bring conservation easements before the Land Board for public comment and review. This *de facto* role of the Land Board is reflected in a range of FWP documents related to conservation easements.

At that time, neither FWP nor the Land Board undertook further legal analysis of whether, *de jure*, Land Board approval was required to complete FWP

conservation easement transactions.

From the 1990s to 2017, the Land Board routinely endorsed FWP conservation easements that came before it. Beginning in 2017, however, the Land Board changed course and began to vote down FWP conservation easements. Half of the conservation easements presented to the Board since 2017 have been rejected or indefinitely delayed.

As a result, FWP has been unable to administer the Habitat Montana program as directed by the Montana legislature. Private landowners have suffered the effects as well. *See* Ex.10.

C. FWP Directed to Conduct Legal Review of Authority.

Following a Land Board meeting during which three Land Board members voted to suspend consideration of the Horse Creek Conservation Easement indefinitely, the Governor asked for a formal legal analysis of the Land Board's role in FWP conservation easements.

On review, FWP agreed with the position of its Director in 1986 and concluded that Montana law does not require Land Board approval for FWP conservation easements. The Governor concurred with FWP's legal analysis. Acting pursuant to his executive discretion, the Governor directed FWP to finalize the Horse Creek project. It had been approved by the Commission but tabled indefinitely by the Land Board, and millions in federal funds for the project were

set to expire.

On August 1, 2018, a legislator requested the Attorney General Opinion in question. On October 15, 2018, the Attorney General released the Opinion, which argues the Attorney General and other Land Board members must approve future FWP conservation easement transactions before they can be completed.

IV. ARGUMENT

A. The Requirements for Original Jurisdiction are Satisfied.

Petitioners meet the requirements for original jurisdiction under Montana Rule of Appellate Procedure 14(4). An actual controversy exists between the parties as to the authority of FWP and the Governor to finalize conservation easements under the Habitat Montana program. "[T]he case involves purely legal questions of statutory construction or constitutional interpretation which are of state-wide importance." M. R. App. P. 14(4). There is a single legal question before the Court: whether the phrase "land acquisition," as used in § 87-1-209, is intended to cover FWP conservation easements. There are no factual questions at issue.

The Petition has statewide importance. It concerns the ability of the Governor, FWP, landowners, and partner organizations to administer the Habitat Montana program around the State as authorized by the Legislature. A decision by this Court will affect not only the tens of thousands of acres at issue in the pending

transactions, but also any future wildlife conservation easements in Montana approved by the Commission.

Finally, "urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate." Mont. R. App. P. 14(4). The first conservation easement project faces a deadline for completion by the end of November. By that time, the Governor and FWP must transfer funds to the landowner or the deal will expire. The Governor and FWP cannot simply seek an *ultra vires* "advisory vote" before the Land Board. If they do and the Land Board votes a project down, the parties will be in the same position of legal uncertainty they are now: Petitioners maintain that the deals are already complete, and the Attorney General's Opinion will hold that they have been vetoed. Even preliminary injunctive relief by a district court will prove inadequate, because temporary relief will not resolve the final merits question in advance of independent financial and contractual deadlines on the transactions. *See Grossman v. Dep't. of Nat. Res.*, 209 Mont. 427, 435-36, 682 P.2d 1319 (1984) (assuming jurisdiction where clarification required prior to bond issuance).

B. The Land Board is not Required to Approve FWP Conservation Easements.

The Montana Legislature has never required Land Board approval for FWP conservation easements. No such requirement is found in Montana law.

1. By its plain text, the phrase "land acquisition" in §209 does not include conservation easements.

A conservation easement is not a "land acquisition." The grantee in a conservation easement does not acquire land. The grantee obtains only a negative servitude against development—an *interest in land*—not land itself.

The Court's "objective when we interpret a statute is to implement the objectives the legislature sought to achieve." *Hiland Crude, LLC v. Dep't of Revenue*, 2018 MT 159, ¶ 12, 392 Mont. 44, 421 P.3d 275 (citation omitted). The Court ascertains "legislative intent, in the first instance, from the plain meaning of the words used." *Id.* (citation omitted). The Court "give[s] effect to all provisions of the statute when possible." *Id.* (citing § 1-2-101, MCA). Where the "Legislature did not use identical language in . . . two provisions, it is proper for [courts] to presume that a different statutory meaning was intended." *Zinvest, LLC v. Gunnersfield Enters., Inc.*, 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270.

The term "land acquisition" in § 87-1-209(1) is not defined in Title 87 or elsewhere in the Code. No case in any jurisdiction construes that term as the Montana legislature intended its use in §209. Accordingly, the term "land acquisition" must be given its ordinary meaning. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011); *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035 ("[w]hen the legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning" (citations and quotation

omitted)).

In ordinary usage, "land" refers to "the solid part of the surface of the earth." *Webster's Third International Dictionary* 1268 (Gove ed., 1961). Black's defines land as "[a]n immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it." *Black's Law Dictionary* 1008 (10th ed. 2009). "Acquisition" refers to "gaining of possession or control over something." *Id.* at 28. Placed together, the term "land acquisition" refers to gaining possession over a portion of the earth's solid surface.

On its face, the term excludes conservation easements. Conservation easements are defined by Montana law as non-possessory *interests in land*—not the land itself. *See* § 76-6-102(2), -104(2), MCA. By their very nature, conservation easements do not involve the acquisition of an "immovable and indestructible three-dimensional area." Only a negative servitude is acquired by the holder of a conservation easement—a non-possessory interest.

Accordingly, conservation easements are not within the scope of the term "land acquisition" as it is used in §209. That provision does not apply to FWP conservation easements, nor does it compel their review before the Land Board.

Contrasting provisions of Title 87, chapter 1 clarify the scope of the term "land acquisition." Section 87-1-301(1)(e), MCA, which sets forth the authority of

the Fish and Wildlife Commission, provides that the Commission must approve "all acquisitions . . . of *interests in* land." (emphasis added). Petitioners and the Respondent agree that this term covers FWP conservation easements because they are "interests in land." *See* § 76-6-102(2), MCA.

Thus, if the Legislature wanted to include conservation easements within the ambit of §209, it had the language to do so. It employed a different term. "Because the enacting Legislature did not use identical language in the two provisions, it is proper . . . to assume that a different statutory meaning was intended." *Zinvest*, 2017 MT 284 at ¶ 26. The canon of meaningful variation is especially warranted here, where the two statutes are so closely related: both set forth the approval process for FWP transactions, and §209 even cross-references §301. The Legislature cannot have been unaware of the term "interests in land" when it employed the different term "land acquisition" in §209. *Big Sky Colony, Inc. v. Dep't of Labor & Indus.*, 2012 MT 320, ¶ 70, 368 Mont. 66, 291 P.3d 1231 ("We must read a whole act together and where possible we must give full effect to all statutes involved." (citation omitted)). Under its ordinary meaning, "land acquisition" excludes conservation easements.

Across the Code, the Legislature has always used the term "land acquisition" according to its ordinary meaning. Invariably, the term appears in conjunction with the actual acquisition of land—never in reference to conservation easements,

and never as a generic stand-in for other lesser, non-possessory interests in land. *See, e.g.*, §§ 7-15-4206(19)(b)(i); 7-15-4288(1); 16-10-103(4)(a)(xii), -(5)(a)(xii); 17-7-203(1)(b), -(2)(b); 70-31-101(2); 77-1-218(1); 77-2-364(4); 85-20-301; 90-6-103(9)(a), MCA. The only other reference to "land acquisition" in Title 87 has no applicability to conservation easements. That reference, in § 87-1-218, requires FWP to prepare notices to counties for, among other things, FWP projects affecting local property tax. Conservation easements have no bearing on local property tax. *See* §76-6-208(1).[1]

It is well-established that a court's analysis "begins with 'the language of the statute,'" and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted). The only question before the Court is whether the Legislature intended for the term "land acquisition," as it is used in §209, to apply to FWP conservation easements. By giving the term "land acquisition" its ordinary meaning, it is clear the Legislature never intended to include FWP conservation easements within that provision of §209. Land Board review is not required.

[1] Black's also defines the related term "acquired land" as "[l]and acquired by the government from private hands[.]" *Black's Law Dictionary*, 1008. The land remains privately-owned in a conservation easement.

2. Legislative history confirms that the phrase "land acquisition" was never intended to cover conservation easements.

Consistent with the ordinary meaning of "land acquisition," the legislative history of §209 confirms that the Legislature used the term to denote the actual acquisition of land, not conservation easements.

Section 209 was amended in 1981 to add the language requiring Land Board approval "in the case of land acquisition involving more than 100 acres or $100,000 in value(.)" Rep. Aubyn Curtiss, who was responsible for the Land Board provision, explained:

> House Bill 766 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.

Ex.8 at *3 (emphasis added). By converting private taxable land into untaxable public land, proponents argued, FWP land purchases were hurting the local tax base. *See* Exs.6-9. In response, the Legislature put new sideboards requiring Land Board approval on FWP's actual acquisition of land. The Legislature limited its intervention only to FWP "land acquisition," in its view, which affected local taxes. It did not disturb the Department's ability to acquire other "*interests in* land," many of which (like conservation easements) do not affect whether a property is taxable.

Conservation easements were uncommon in 1981. And it is no surprise they

were not a focus of the amendments to §209: in conservation easements, private landowners continue to own the land and pay local property taxes. The only place the words "conservation easement" appear anywhere in the legislative history is a passing reference by then-FWP Director Flynn, opposing a separate bill, in which he speculated that the bill would have an effect on all FWP acquisitions. After debate, the Legislature chose to employ the limited term "land acquisition," whose ordinary meaning excludes conservation easements.

In sum, the term "land acquisition" does not encompass conservation easements. Examining the Legislature's aims in amending §209 confirms that it did not intend to include conservation easements and other non-possessory interests in the scope of its amendments. Montana law simply does not require Land Board approval for conservation easements. They are complete upon the Commission's approval.

C. The Attorney General Opinion Improperly Stops Petitioners From Closing.

1. The Opinion imposes a requirement the Legislature did not.

The Attorney General's Opinion refashions the plain text of §209. It rests on the flawed premise that "land acquisition" and "acquisition of an interest in land" are "synonymous" and yet simultaneously denote "different concepts." *Compare* Opinion (Ex.3), ¶¶ 13 and 28. That logic does not follow, and it bedevils the Opinion from beginning to end.

First, the Opinion takes up the analysis of "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)." Opinion, ¶ 13. This is the core of the Opinion's examination of the text of §209, provided at paragraphs 13 through 22. The textual argument can be summarized as follows: many property terms carry technical meanings. *Id.*, ¶ 16. The term "land acquisition" is not defined in the sources consulted. *Id.*, ¶ 17. Therefore, it is a generic term and denotes any "legally cognizable interest in land." *Id.* And as a generic term, it is shorthand for the other generic term "interests in land." *Id.*, ¶¶ 18-19.

This logic simply does not compute. Not meaning one thing is not the same as meaning anything and everything. But this is, in essence, the logic the Opinion marshals to argue that two different terms are the same.

Its reasoning aside, the argument plainly ignores the rule of statutory construction that variation in statutory terms is meaningful, particularly where two statutes are related. The conclusion that "land acquisition" in §209 means *all* acquisitions of an interest in land can only make sense by ignoring §301, which grants the Commission the authority to approve "acquisitions of interests in land." The Legislature already has a generic term to describe all "legally cognizable" property relationships, rather than land itself. That phrase, "interests in land," is employed in exactly this way in the very same title and chapter of the law—at

§301. The Opinion strolls past §301. This Court should not.

The merger of "land acquisition" and "acquisition of interests in land" is an awkward fit. The Opinion does not address it until later, ¶ 28, where it seeks to deflect the canon of meaningful variation by arguing that §301 and §209 are so profoundly unrelated, that they refer to "different concepts" and thus the canon does not apply. This argument, too, fails. Sections 301 and 209 are closely related. They expressly cross-reference each other and they both address the approvals required for certain FWP transactions.

The remainder of the Opinion's analysis does little to disrupt the plain meaning of the term "land acquisition" as the Legislature intended its use in §209. For example, starting at ¶ 30, the Opinion examines the term "land acquisition" in other jurisdictions and secondary sources. Not one of these cases is on point. None deals with interpretation of a statute using the term "land acquisition," nor do any deal with a court concluding as a matter of law what constitutes "land acquisition." Each is plainly distinguishable. Moreover, other jurisdictions are not relevant if Montana law answers the question at hand.

The legislative history is largely addressed above. Respectfully, the Opinion presents a misleading picture of the Legislature's debate on the 1981 amendment. The complete legislative history of this provision confirms that §209 was amended in response to a concern about local taxation—not a series of generalized

grievances against FWP, or any considerations specific to conservation easements. The Opinion hangs its hat on a single reference to conservation easements, buried in four pages of testimony submitted by an opposition witness on a different bill. Had the Legislature wanted to limit FWP in its acquisition of "all legally cognizable interests in land," as the Opinion suggests, it knew how to do so. It did not and employed the narrower term "land acquisition" instead.[2]

The Opinion concludes by pointing to FWP's prior practice of noticing FWP conservation easements to the Land Board for approval. Here, the notion that an agency is bound by a prior, incorrect interpretation of a statute is both wrong as a matter of law and troubling as a matter of policy. Past practice cannot transfigure the meaning of a statute. "In the construction of a statute, the intention of the legislature is to be pursued if possible." Section 1-2-102, MCA. It would be an offense to separation of powers principles if an agency could revise a statute's meaning.

Moreover, the Opinion's reliance on agency practice is unsupported. Indeed, at least twice in the 1980s, the Department declined to take FWP conservation easements before the Land Board precisely because they were not

[2] The structure and legislative history of §209 also upend the suggestion that "land acquisition" is shorthand for property terms elsewhere in §209. *See* Opinion, ¶ 17. Land acquisition appears in an independent clause, added in 1981. The words below describe kinds of relationships FWP may enter. They are not defined or modified by the 1981 amendment.

"land acquisitions" under §209. Exs. 11-1, 11-2.

2. The Court owes the Opinion no deference.

"Attorney General Opinions . . . are not binding on District Courts or the Supreme Court." *Montana Immigrant Justice All. v. Bullock*, 2016 MT 104, n.2, 383 Mont. 318, 371 P.3d 430 (citing § 2–15–501(7), MCA; *O'Shaughnessy v. Wolfe*, 212 Mont. 12, 17, 685 P.2d 361, 364 (1984)). "To hold otherwise . . . the legislative, and even the judicial power would pass to the executive, at least in the negative or vetoing sense." *O'Shaughnessy*, 212 Mont. at 17. *See Mont. Power Co. v. Mont. Dep't. of Pub. Serv. Regulation*, 218 Mont. 471, 483-84, 709 P.2d 995 (1985) (if Attorney General's power to provide legal advice could supplant lawful exercise of executive discretion by another official, it "would make the Attorney General a super-officer, whose discretion on any state subject could override that of other public officers, by testing his discretion against theirs in court.").

V. CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition, assume original jurisdiction, and declare that § 87-1-209, MCA, does not require Land Board approval for FWP conservation easements.

Respectfully submitted this 22nd day of October 2018.

/s/ Raphael Graybill

Raphael Graybill
Chief Legal Counsel
Office of Governor Steve Bullock

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(9)(b) of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points and is double spaced. The total word count is 4,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, certificate of compliance, and certificate of service. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Raphael Graybill

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