IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 18-0599

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 FOX, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MONTANA,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR DECLARATORY RELIEF ON ORIGINAL JURISDICTION

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1. **Whether government officials, solely in their official capacities, have standing to challenge an Attorney General Opinion, where the officials have not personally sustained any injury-in-fact resulting from the Opinion.**

2. **Whether "land acquisition" as used in Mont. Code Ann. § 87-1-209(1) includes conservation easements.**

THE FACTS

For at least the last quarter century, the Department of Fish, Wildlife, and Parks (FWP) has recognized that the phrase "land acquisition" as used in Mont. Code Ann. § 87-1-209(1) includes conservation easements; *i.e.*, that the statute requires FWP to submit proposed conservation easements to the Board of Land Commissioners (Land Board) for vote and final approval, and has done so with over 50 such easements since 1992. Aff. of Jeanne Wolf (Attach. 1) at Ex. A. In 1992, for example, in the FWP Snow Crest Conservation Easement approval process, FWP Wildlife Administrator Don Childress reported to the Department of State Lands as follows:

> ***Statute 87-1-209 requires approval of this easement by the Land Board***. If the Fish, Wildlife and Parks Commission decides to purchase the easement, we would like such approval, and we will advise you of the outcome of the April 16 Commission meeting regarding this item and

> whether or not this agenda topic needs to be carried to your Land Board.

Id. at Ex. B.

Yet earlier this year after the Land Board majority indefinitely postponed consideration of the Horse Creek Complex Conservation Easements, the Governor concluded that the Land Board's role—in which he actively participated for 9 years on 23 separate occasions—has been "de facto" ("illegal or illegitimate;" *see* Black's Law Dictionary 416 (6th ed. 1992)), Pet. at 5, and "an *ultra vires* advisory vote," *Id*. at 8; Wolf Aff. at ¶ 7.

FWP then closed on the Horse Creek Complex Easement, totaling over 15,000 acres with a value of $6,150,000.00, without Land Board approval, notwithstanding that the Environmental Assessment for the acquisition assured the public that: "As with other FWP conservation projects that involve land interests, the FW Commission and ***the State Board of Land Commissioners would make the final decision***."[1]

[1] Available online at http://fwp.mt.gov/news/publicNotices/conservation/Easements/pn_0033.html (p. 5)

ARGUMENT

I. The Petition should be dismissed for lack of jurisdiction because the Governor and Director lack standing.

A. Neither Governor Bullock nor Director Williams have claimed any injury-in-fact affecting them in a personal and individual way.

As the Court recognized in *Heffernan v. Missoula City Council*, standing is one of several justiciability doctrines limiting courts to deciding only "cases" and "controversies." 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. Courts lack power to resolve a case brought by a party without a *personal* stake in the outcome, because such a party presents no actual case or controversy. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427. Consequently, "standing is a threshold, jurisdictional requirement in every case." *Id.* Specifically, the plaintiff (or petitioner) must show in her complaint (or petition), "at an irreducible minimum, that she has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action." *Id.*, ¶ 10 (citations and quotations omitted).

Moreover, the injury must be concrete rather than abstract; *i.e.*, actual or imminent, not conjectural or hypothetical. *Id.* Put another

way, "the plaintiff must show that he has sustained, or is in immediate danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Id.* Furthermore, the injury must be "particularized," affecting the claimant "in a personal and individual way." *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Governor Bullock and Director Williams failed to allege any sort of particularized injury personal to either of them, and thus have failed to present a justiciable controversy. They have no standing.

1. Neither Governor Bullock nor Director Williams has suffered a past, present, or threatened injury to a property or civil right.

The Governor and Director do not seek a remedy for an injury to a private right personally affecting Steve Bullock or Martha Williams individually. Rather, they seek a declaratory ruling granting their respective offices the political power to direct the purchase of FWP conservation easements without independent Land Board approval. Pet. at 18. In *Raines v. Byrd*, the Supreme Court held that a politician lacks standing where her claim "is based on a loss of political power, not loss of any private right, which would make the injury more concrete." 521 U.S. 811, 821 (1997); *see also Heffernan,* ¶ 30 n.3 (Montana courts

follow federal precedents in interpreting justiciability requirements of Mont. Const. Art. VII, § 4(1)). As demonstrated below, the Supreme Court's reasoning and holding in *Raines* are fatal to any claim of standing by the Governor or Director.

2. The Governor and Director have sued solely in their official capacities, which forecloses any claim of standing because it reflects the lack of the requisite injury affecting them in a personal and individual way.

In *Raines*, six Members of Congress sued the Treasury Secretary, challenging the constitutionality of the "Line Item Veto Act," which gave the President authority to void certain spending and tax benefit measures. *Raines* at 814. The six Members of Congress claimed the Act injured them "directly and concretely . . . ***in their official capacities***" by 1) altering the effect of votes they cast; 2) divesting them of their constitutional role in the repeal of legislation; and 3) altering the constitutional balance of power between the Legislative and Executive branches. *Id.* at 816 (emphasis added). The lower court ruled the Act unconstitutional. The Treasury Secretary appealed to the Supreme Court.

The Supreme Court reversed, holding that the six Members of Congress had no standing to bring the suit. First, the Court recognized that courts have jurisdiction over a dispute only if it presents a "case or controversy"; one element of which is the standing of the party seeking relief as reflected in the complaint. *Id*. at 819. The Court emphasized that to have standing, "[a] plaintiff must allege ***personal injury*** fairly traceable to the defendant's allegedly wrongful conduct." *Raines* at 857-58 (emphasis added by Court). A plaintiff must claim a "personal stake" in the dispute "particularized as to him," meaning that the injury must affect the plaintiff in a "personal and individual way." *Id*. at 858 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Loss of political power, in contrast, does not constitute a cognizable injury for purposes of standing. *Raines* at 821.

Like the Governor and Director here, the six Members of Congress in *Raines* sued solely in their official capacities. *Id*. As the Court explained, "[i]f one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead." *Id*. Consequently, "[t]he claimed injury thus runs (in a sense) with the Members' seat, a seat which the Member holds (it may quite

arguably be said) as trustee for his constituents, not as a prerogative of personal power." *Id*. This sort of claimed injury is insufficient as a matter of law to confer standing. Although it affects the discharge of the individual's official duties, it does not constitute a personal injury; *i.e.*, one which affects the official in a personal and individual way.

So it is in the present case. The Governor "petitions the Court in his official capacity," Pet. at 3, which precludes his standing in this context.[2] *See Raines* at 821. The Governor has not sued as an individual who sustained an injury. Rather, he brings suit as "the State's chief executive" with "supervisory authority over FWP" and as "president of the Land Board." *Id*. Like the six Members in *Raines*, if the Governor were to retire tomorrow, he would be divested of any theoretical claim, which would pass to his successor. The alleged injury is not "personal" to the Governor; therefore, he has no standing. *See id*.

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[2] Although Montana case law reflects instances of the Governor suing in his official capacity (*see, e.g. State ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975) and *Schwinden v. Burlington N.*, 213 Mont. 382, 691 P.2d 1351 (1984), those cases are not instructive because standing was not raised in either case. *See Schweitzer v. Montana Legislative Assembly*, 2010 Mont. Dist. LEXIS 300 (Dec. 29, 2010) (applying *Raines* and dismissing Governor's declaratory judgment action, brought "in his official capacity," for lack of standing).

The same is true for FWP Director Williams. She, too, "petitions the Court in her official capacity" as a public official who oversees the administration of the Habitat Montana Program (Pet. at 3-4)—not as an individual who sustained an injury necessary for standing.

3. The injury alleged is to the State, not Steve Bullock or Martha Williams personally.

Rather than a personal injury, the Governor and Director allege a loss ***to the State*** which will allegedly occur if pending conservation easements are prevented from closing. Pet. at 3 ("Each [pending easement] represents ***a significant loss to the State*** if it cannot be completed within the required time.") (emphasis added).

Representing the State of Montana and its legal interests is the sole province of the Attorney General as "the legal officer of the state." Mont. Const. Art. VI, § 4(4). It is the exclusive prerogative of the Attorney General to "control and manage ***all litigation in behalf of the state***." *Olsen v. PSC,* 129 Mont. 106, 115, 283 P.2d 594, 599 (1955) (emphasis added). The Governor brought this proceeding on behalf of the State to defend the State's interest, and thereby oversteps and attempts to usurp the constitutional role of the Attorney General. He has no standing to do so. *See id*.

Finally, courts must insist on "strict compliance" with the jurisdictional standing requirements. *Raines*, 521 U.S. at 819. Courts must be diligent to keep the judicial power within its proper constitutional sphere, and "must put aside the natural urge to proceed directly to the merits" of important disputes and to "settle" them for the sake of convenience and efficiency. *Id.* at 820. "Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* Such inquiry here conclusively reveals the Governor and Director failed to meet their burden.

This ends the matter. The Court need not address the remaining legal issues of statutory construction, or the factual issues the Governor and Director have improperly attempted to interject into this proceeding. The proper course is simple and straightforward: dismissal for lack of standing. The Court need go no further.

B. The Court should decline to address this controversy under prudential standing principles because it involves a political question for the legislature, not the courts.

As the Court recognized in *Heffernan v. Missoula City Council*, "there are in fact two strands to standing: the case-or-controversy requirement imposed by the Constitution, and judicially self-imposed prudential limitations." 2011 MT 91, ¶ 31, 360 Mont. 207, 255 P.3d 80. Specifically, "the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches." *Heffernan,* ¶ 32.

The benefits of conservation easements as a matter of public policy is not the issue—and cannot be. Attorney General Fox maintains a deep commitment to land conservation, and the significant positive effects of conservation easements and public access to lands, having voted in support of every conservation easement that has come before the Land Board during his tenure, and he is particularly committed to public access.

Yet this case is not, and must not become, about the policy reasons favoring conservation easements. All parties agree, as a matter of public policy, that conservation easements are extremely beneficial.

Indeed, the disagreement between the Governor and the Attorney General is whether the Governor, his appointed FWP Director, and his appointees to the Fish and Wildlife Commission (*see* Mont. Code Ann. § 2-15-3402) should have the unfettered power to commit millions of dollars of public funds to purchase conservation easements with no independent oversight.

Notwithstanding Attorney General Fox's consistent and vigorous support for conservation easements and public access, he recognizes that the proper degree of independent oversight is a question for the Legislature, not the Court.

II. The plain meaning of "land acquisition" in Mont. Code Ann. § 87-1-209(1) includes conservation easements.

A. To avoid unnecessary duplication, the legal analysis set forth in 57 Op. Att'y Gen. 4 (Oct. 15, 2018) is incorporated herein by reference.

Specifically, *see* 57 Op. Att'y Gen. 4 at ¶¶ 4-1 (Law of Easements in Montana); *id.*, ¶¶ 13-29 (Plain Meaning of Land Acquisition in Montana); *id.*, ¶¶ 30-33 (Plain Meaning of Land Acquisition in Other Jurisdictions); *id.*, ¶¶ 34-40 (Legislative History); and *id.*, ¶¶ 41-54

(FWP's Long and Continued Course of Applying Mont. Code Ann. § 87-1-209(1) to Conservation Easements).

B. Bullock and Williams' arguments regarding the meaning of "land acquisition" are flawed in numerous respects.

Assuming the Governor and Director had standing, their challenge to the Attorney General Opinion fails under the plain language of Mont. Code Ann. § 87-1-209(1), which provides:

> Subject to 87-1-218(8) 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 authorizes FWP acquisitions of interests in land, including "easements upon lands or waters." The consent of either the Fish and Wildlife Commission or the State Parks and Recreation Board is required for all such acquisitions, depending on the type. The statute further requires approval of the Land Board for all such acquisitions involving more than 100 acres or $100,000 in value.

The above construction is consistent with companion statutes, such as Mont. Code Ann. § 23-1-102(3), which specifically addresses acquisition of areas for state parks, recreational areas, monuments, and historic sites under § 87-1-209(1):

> A contract, for any of the purposes of this part, may not be entered into or another obligation incurred until money has been appropriated by the legislature or is otherwise available. ***If the contract or obligation pertains to acquisition of areas or sites in excess of either 100 acres or $100,000 in value, the board of land commissioners shall specifically approve the acquisition***.

Id. (emphasis added). This statute removes any doubt of the necessity of Land Board approval of conservation easements and requires Land Board approval of ***all*** FWP acquisitions of state parks, recreational areas, monuments, and historic sites of the requisite size and/or value. "[A]cquisition of areas or sites" is sufficiently broad enough to include acquisitions by conservation easements.

Hence, to the extent any theoretical ambiguity exists regarding the meaning of "land acquisition" in Mont. Code Ann. § 87-1-209(1), the plain language of § 23-1-102(3) clears it up. Statutes relating to the same subject matter "should be construed together and effect given to both if it is possible to do so." *Mountain W. Farm Bureau Mut. Ins. v.*

Hall, 2001 MT 314, ¶ 23, 308 Mont. 29, 38 P.3d 825. Montana Code Annotated § 23-1-102(3) demonstrates the Legislature's intent to require Land Board approval for conservation easements pertaining to state parks, recreational areas, monuments, and historic sites after approval by the State Parks and Recreation Board. It would defy logic and reason to deny the Legislature's intent to require the same for conservation easements approved by the Fish and Wildlife Commission.

1. The Governor's argument is based on the false assumption that a distinction exists between an interest in land and the land itself.

The core of the Governor and Director's argument is predicated on a false dichotomy—a purported distinction between acquisition of an "interest in land" and acquisition of "the land itself." *See, e.g.*, Pet. at 9, 10, 13. The Governor essentially argues that easements are mere "*interests in land*—not the land itself," and therefore cannot be considered a "land acquisition" within the meaning of Mont. Code Ann. § 87-1-209(1). Pet. at 10 (emphasis in original). This is a distinction without a difference because acquisition of "the land itself" ***is*** also an acquisition of an "interest in land." *See Libby Placer Mining Co. v.*

Noranda Minerals Corp., 2008 MT 367, ¶ 36, 346 Mont. 436, 197 P.3d 924 (recognizing that "an interest in land" includes a fee simple estate).

Moreover, in construing the term "land acquisition," the Governor and Director relies on two authorities: 1) the Webster's Dictionary definition of "land" (a portion of the earth's solid surface) and 2) the Black's Law Dictionary definition of "acquisition" ("gaining possession ***or control*** over something"). Pet. at 10 (emphasis added). They then take the Webster's definition of "land" and merge it with a distorted and incomplete *Black's* definition of "acquisition," ***omitting the key phrase, "or control,"*** and assert that "the term 'land acquisition' refers to gaining possession over a portion of the earth's solid surface." *Id*. A conservation easement grants a right of substantial "control" over the subject property. *See* Mont. Code Ann. § 76-6-104(2) (in granting conservation easement, owner "relinquishes to the holder of such easement . . . 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").

Had the Governor and Director not selectively edited the *Black's* definition of "acquisition," under their approach they would define "land acquisition" properly, as "gaining possession ***or control*** over a portion of the earth's solid surface." This indisputably places conservation easements squarely within the definition of "land acquisitions," as jurisdictions throughout the nation have consistently held. *See* 57 Op. Att'y Gen. 4 at ¶¶ 30-31.

2. The Governor misapplies the "meaningful variation" rule of statutory construction.

The Governor and Director argue that the only acceptable statutory reference to acquisition of conservation easements is "acquisitions of interests in land." Pet. at 10-12. This, they claim, precludes inclusion of conservation easements within Mont. Code Ann. § 87-1-209(1), which refers to "land acquisitions." Their theory is based on the general rule of statutory construction that "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." *Zinvest, Ltd. Liab. Co. v. Gunnersfield Enters.*, 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270.

In support of this argument, the Governor and Director rely on Mont. Code Ann. § 87-1-301(1)(e), which refers to the Fish and Wildlife Commission's authority to "approve all acquisitions or transfers by the department of interests in land or water." The operative phrase in Mont. Code Ann. § 87-1-209(1), by comparison, is "in the case of land acquisition involving more than 100 acres or $100,000 in value." The Governor argues that because § 301 uses the phrase "acquisitions . . . of interests in land," and § 209(1) uses the phrase "land acquisitions," they should be construed to mean two different things.

And they do. The two statutes address two different types of land acquisitions: Section 301(1)(e) addresses "***all*** acquisitions ***or transfers*** by the department of interests in land ***or water***" (emphasis added) without limitation regarding size or value. The relevant language of § 209(1), in contrast, is much narrower, referring only to a "land acquisition ***involving more than 100 acres or $100,000 in value***." (emphasis added). Of course, the Legislature would use different terminology to address these two different concepts. The Governor's "canon of meaningful variation" argument thus collapses.

3. The Governor and Director's position that FWP has submitted conservation easements to the Land Board "out of courtesy" is indefensible.

Although the Petition does not address why FWP has consistently brought conservation easements to the Land Board for the past quarter-century, the Petition refers to a legal analysis from FWP and indicates that "the Governor concurred with FWP's analysis." Pet. at 6. The Governor's office has provided the Attorney General with two memoranda from FWP, dated March 23 and July 31, 2018. In the March 23 memo, FWP asserts that "the Department has taken conservation easements over 100 acres or $100,000 in value to the Land Board ***out of courtesy***." *See* Attachment 2 at 1 (emphasis added). Although "[t]he attorney general of the state is the legal adviser of the department," Mont. Code Ann. § 87-1-105, FWP did not consult with the Attorney General in connection with the formulation of FWP's legal position.

The notion that FWP has taken conservation easements to the Land Board "out of courtesy" is simply nonsensical. "The law neither does nor requires idle acts." Mont. Code Ann. § 1-3-223. One may give "notice" out of courtesy or for informational purposes. FWP does not

give such notice; rather, it submits conservation easements to the Land Board as an agenda item for Board consideration, public comment, deliberation, vote, and ***approval***.

For example, in 2008, after approval by the Fish and Wildlife Commission, the Land Board voted 5-0 to reject the proposed Cornwell Ranch Conservation Easement and referred it back to FWP for further discussion with the landowner. Wolf Aff. at Ex. C, pp. 1-4. The Easement did not again come before the Land Board and was never finalized. Had Conwell been submitted to Land Board "out of courtesy" for a meaningless vote, the Cornwell Easement would have been finalized. It was not.[3]

It is equally nonsensical for the Governor and Director to so vigorously and confidently assert throughout their Petition that the language of Mont. Code Ann. § 87-1-209(1) is so clear, plain, and unambiguous in not requiring Land Board approval of conservation easements. If FWP actually believed that, its quarter-century practice of seeking such approval defies logic and reason.

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[3] The 2008 Land Board was comprised of one Republican and four Democrats; therefore, it cannot be assumed that rejection of conservation easements is a partisan issue.

In sum, the Governor and Director can offer no credible reason why FWP submits conservation easements to the Land Board. The real answer is obvious: because Mont. Code Ann. § 87-1-209(1) requires it.

4. The Declaration of Jim Flynn should be disregarded.

The Governor attached a Declaration of former FWP Director Jim Flynn to the Petition. Pet. at Ex. 11. The Declaration should be disregarded as irrelevant and an improper interjection of issues of fact in an original proceeding.

The purpose of considering legislative history is to aid courts in ascertaining legislative intent. To that end, the Attorney General Opinion cited the 1981 testimony of then-FWP Director Flynn, in which he advised the Legislature that FWP "land acquisitions" ***include conservation easements***. Pet. Ex. 9 at 13 (emphasis added). Specifically, Flynn testified in opposition to the land acquisition amendment because "[t]he department's acceptance of ***conservation easements*** would be curtailed also, if not shut down entirely." *Id.* (emphasis added). Similarly, in 1987, Flynn testified in support of Habitat Montana, assuring the Legislature that acquisitions would be reviewed by the Land Board, describing the final step in the process

as "***review by the State Land Board***." House Minutes of the Fish and Game Committee at 4 (Feb. 17, 1987) (emphasis added).

Flynn now submits a Declaration rebutting his prior testimony. His change of opinion is irrelevant. The Attorney General Opinion quoted then-Director Flynn's testimony to demonstrate ***the legislature's understanding*** of "land acquisition" at the time it passed HB 766; *i.e.*, that as a result of Flynn's 1981 testimony, the Legislature passed HB 766 with the understanding that "land acquisition" includes acquisition of conservation easements.

CONCLUSION

For the foregoing reasons, Attorney General Tim Fox requests that the Petition be denied and dismissed.

Respectfully submitted this 12th day of November, 2018.

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By: */s/ Rob Cameron*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,995 words, excluding certificate of service and certificate of compliance.

/s/ Rob Cameron
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APPENDIX

CERTIFICATE OF SERVICE

I, Robert Cameron, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 11-13-2018:

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