IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court 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,

vs.

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

Respondent.

BRIEF OF PUBLIC LAND/WATER ACCESS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' REQUEST FOR DECLARATORY RELIEF

(Appearances on next page)

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INTRODUCTION

This case asks the Court to settle a very specific dispute over an opinion of the Montana Attorney General ("Opinion") (Exhibit 3 of Petitioners' Brief) (hereinafter referred to as "Governor/ FWP"), which claims the Board of Land Commissioners ("Land Board") has the authority to block conservation easements proposed by the Montana Department of Fish Wildlife & Parks ("FWP"). The legal question essentially comes down to whether the term "land acquisition," as it is used in § 87-1-209(1), MCA, was intended to include FWP conservation easements. It was not. Both the plain language used in the statute ("land acquisition" instead of the broader term "interest in land") and the legislative history support Governor/FWP's request that this Court declare that Land Board approval is not required for FWP conservation easements.

While the legal issue presented is narrow, the impact of this decision will make a difference in the lives of sportsmen and other outdoor recreationists across Montana for years to come. The viability and continued success of the Habitat Montana program is

at stake. Habitat Montana has been used by FWP for over three decades to put together land deals that benefit landowners and provide public access to both public and private land for every Montanan.

A. The Habitat Montana Program.

The FWP habitat acquisition program was originally established through legislation passed by the 1987 Montana Legislature (87-1-241, et. seq., MCA). The program is "popularly known as Habitat Montana," § 12.9.508(2), ARM. That regulation provides that:

> (2) through Habitat Montana, the commission and department will establish a statewide wildlife habitat system which will conserve our wildlife resources and pass them intact to future generations.

Habitat Montana is one of Montana's most successful conservation and public access programs. The money for the program comes from a small fee on hunting licenses and is used for conservation easements with willing landowners, as well as targeted fee title land purchases and fishing access sites. As of December 2016, FWP held 43 Habitat Montana wildlife conservation easements covering 240,452 acres and costing

approximately $28.2 million and fee title ownership totaling 135,520 acres, costing $46.0 million. These acquisitions were with Habitat Montana funds. By area, Habitat Montana projects are comprised of 54% easements, 31% fee title, and 15% lease.[1] According to a report to the Montana Legislature on the program,

> Habitat Montana came into existence from a need felt by the people of Montana. Montanans cherish their wildlife and outdoor opportunities. In order to keep wildlife abundant into the future, the necessities of life for wild animals need to be maintained. In other words, conservation of habitat is an important goal for Montanans to preserve their way of life.

Id., p. 4. Numerous federal agencies, private companies and conservation organizations have partnered with FWP to protect tracts of important habitat, including the Nature Conservancy, Rocky Mountain Elk Foundation, Trout Unlimited, Trust for Public Lands, Confederated Salish-Kootenai Tribes, U.S. Forest Service, U.S. Bureau of Land Management, U.S. Fish and Wildlife Service, Bonneville Power Administration, Montana Wildlife

[1] "Habitat Montana," Report to 65th Montana Legislature, Montana Fish, Wildlife, and Parks, January 2017. Copy attached to this brief as Appendix 1.

Federation, Northwestern Energy, PPL-Montana, Flathead Land Trust and others. *Id.*

Many of these areas are open to public hunting through related agreements with landowners, and are a major reason why Montana hunters enjoy the longest hunting seasons in the west. Simply put, Montanans made a choice decades ago to invest in important habitat, and all Montanans can now enjoy the fruits of that public investment today.

The 1987 Montana Legislature provided that the bulk of funding for the program would be fees from hunting licenses:

> The debate in the legislature was between those who did not want the Department buying land and those who saw habitat as the foundation for the future. The compromise by the legislature was authority given to the Department to acquire **interests in land**, with the legislature directing the agency to attempt conservation easements or lease before fee title purchase. Fee title purchase was still allowed because the legislature understood the seller of land would determine which method was in his best interest.

Id., p. 6 (emphasis added). Approximately 92% of revenue for the program comes from nonresident hunting licenses. *Id.*

Habitat Montana is also essential to farmers and ranchers. This program actually fosters private property interests, while

devoting private land to public use. By entering into voluntary agreements with FWP, agricultural producers can pay off debt, expand their farming and ranching operations, grow their herds, or address a host of other financial needs–some of which may mean being able to keep a ranch or lose it. The funding for a conservation easement is a strong tool to protect open space and help keep family ranches intact. In short, these Habitat Montana conservation easements provide families a vital asset to secure their financial future.

B. The Conservation Easement Program.

These agreements often take years to work out. Conservation easements involve extensive discussions within a family before approaching FWP or a land trust to begin working out the terms of an easement. While conservation easements often have a great deal in common, each has its own unique conditions. The easement must suit the needs of a landowner who will continue producing crops and livestock, while preserving the open space and wildlife habitat Montanans value. Landowners inevitably invest a tremendous amount of time, energy and money

into these projects. Conservation easements can require land appraisals, document preparation, attorney fees, and surveys. This can add up to thousands or tens of thousands of dollars in upfront costs. Often, a landowner may have related land purchases and/or exchanges in the works which are dependent on the completion of a conservation easement and the funding that comes with it. These are very complicated land deals.

Meanwhile, Montana FWP negotiates additional agreements with the landowners to secure public access to and across their private property so Montanans can enjoy the public resources there. It is a great partnership intended to benefit all Montanans.

C. The Current Controversy.

The fate of the program became unclear recently, however, when the Land Board, after years of deference to FWP, began rejecting or delaying Habitat Montana Conservation easements. The Land Board's rejection of these conservation easements is, in effect, a surefire way to usurp FWP's ability to administer the Habitat Montana program. Currently FWP has over a dozen easements in the works, several of which need to close by the end

of the year. Three have received final approval by FWP. They await only direction from the Governor and FWP to transfer the necessary funds, and one must be completed by November 30.

Just these three easements alone will protect over 18,000 acres of land. They will also provide public access to thousands of acres of private land, and help the public reach more thousands of acres of public lands through private property. This land will allow for many recreational uses such as hunting, trapping, hiking and wildlife viewing.

If FWP cannot finalize these deals, each of which has been approved by the Fish and Wildlife Commission, the deals will fail. Both the families involved and the public will suffer the results. Moreover, the resulting chilling effect could effectively kill the Habitat Montana program entirely. Why should any family landowner enter into a years-long process of investment that can be killed at the last minute for political reasons? In short, Montana's farmers, ranchers, wildlife, habitat, and hunting traditions would be far worse off.

Thus, after an appropriate legal review, Governor/FWP took the only reasonable action left—to move forward with the planned easements without the customary-but-unnecessary approval of the Land Board. That action was then blocked by the Opinion, which incorrectly established that the Land Board can prevent the Habitat Montana program from functioning under the direction of FWP as intended.

The type of uncertainty created by the Opinion will kill projects before they even start. Reasonable landowners will not approach FWP to begin such a lengthy, expensive project with the current risk of having the project summarily denied by the Land Board. Thus, PLWA hopes that this Court will vindicate and protect the authority of FWP to manage Habitat Montana without Land Board interference—whose say in these matters was once grounded in custom, but never in law.

IDENTITY AND INTERESTS OF AMICUS CURIAE

The Public Land/Water Access Association, Inc., ("PLWA") is a statewide nonprofit nonpartisan organization dedicated to maintaining, restoring, and perpetuating public access to the

boundaries of all Montana public land and waters. For over three decades, PLWA has vigilantly protected Montana's access to public land for sportsmen and outdoor recreationists, including appearances before this very Court. Conservation easements are a critical tool for establishing and maintaining public access through private property to vast areas of public land. PLWA therefore has an interest in the proper delegation of authority for management of the Habitat Montana program. The undue requirements created by the Opinion are catastrophic to FWP's administration of the Habitat Montana program, and therefore detrimental to PLWA's mission of protecting access to public land. PLWA files this brief to assist the Court in understanding the broader stakes of the case presented, as well as to confirm that Montana law supports the interpretation advanced by Petitioners in this case—not the Opinion.

ARGUMENT

I. FWP CONSERVATION EASEMENTS DO NOT REQUIRE LAND BOARD APPROVAL.

The Opinion is incorrect as a matter of law. It turns on a definition of "land acquisition" that would surprise most private

landowners in Montana. Conservation easements are not a "land acquisition" under § 87-1-209, MCA ("§209"). The Opinion assumes that the past practice of putting conservation easements before the Land Board is required. A look at the actual governing statutes, and the intentions of those involved in drafting and implementing them, however, reveals that this common practice was, in fact, entirely unnecessary.

A. The plain language of § 87-1-209, MCA, does not extend to Conservation Easements.

Section 209 provides that "**land acquisition** involving more than 100 acres or $100,000 in value" requires "approval of the board of land commissioners." (Emphasis added.) A conservation easement, however, is not a "land acquisition," and therefore does not require Land Board approval. Instead, an easement is a "nonpossessory interest in land." *Walker v. Phillips*, 2018 MT 237, ¶12, 427 P.3d 92. Because conservation easements are not "land," FWP conservation easements are complete under § 209 after approval by the Fish & Wildlife Commission. § 87-1-301(e).

Common sense dictates that no landowner with a conservation easement would ever explain that the holder of the

easement had "acquired" her land. The holder of a conservation easement only acquires certain negative restrictions. Instead, the landowner—subject to additional restrictions—keeps her land.

The Opinion acknowledges that the Land Board's authority is a "much smaller sub-set" than the authority of the Fish and Wildlife Commission, which approves FWP transactions under the Habitat Montana program. Opinion, ¶28. Nevertheless, the Opinion continually glosses over the discrepancy between the right to use real property and the ownership of the actual land at issue.

To broaden the scope of the Land Board's authority, the Opinion takes a curious path. It first equates "easements" with "property," citing cases involving the takings clause. Then, the Opinion equates the terms "property" and "land" without additional explanation. The Opinion's apparent goal is to suggest that Conservation Easements are "land." Logically, this does not follow. While an "easement" and "land" are both "property" for

takings purposes, this does not mean that an "easement" is "land."[2]

Moreover, § 87-1-301(1)(e), MCA, which sets forth the authority of the Fish and Wildlife Commission, provides that the Commission (but not the Land Board) must approve "all acquisitions…of **interests in** land." (Emphasis added.) The Attorney General concedes that this term covers FWP conservation easements because they are "interests in land." *See* § 76-6-102(2), MCA; *see also* Opinion, pp. 6, 7. The Governor/FWP agree. Governor/FWP Br., p. 11. In contrast, § 87-1-209 requires approval of the "board of land commissioners" "…in the case of **land acquisition** involving more than 100 acres or $100,000 in value. (Emphasis added.) Thus, because the term "interests in land" is different from "land acquisition," § 87-1-209 has no application to conservation easements.

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[2] Two things that belong in the same category are not necessarily the same thing. For example, just because a chair is property, and a table is property, this does not mean that a table is a chair. And, like conservation easements, neither constitutes "land."

In the same statute, § 87-1-209, MCA, subsection (4) permits the director of FWP to grant or acquire roads, utilities, drainage and ditch easements "if the full market value of the **interest to be acquired** is less than $20,000." (Emphasis added.) This language, similar to that employed in § 87-1-301(1)(e) "interests in land" is different from the term "land acquisition" in subsection (1) of § 87-1-209. This further reflects the term "land acquisition" is not synonymous with acquisitions of interest in land under the conservation easement statute. *See Zinvest, LLC v. Gunnersfield Enterprises, Inc.*, 2017 MT 284, ¶ 20, 389 Mont. 334, 405 P.3d 1270; *see also In re Kesl's Estate,* 117 Mont. 377, 386, 161 P.2d, 641, 646 (1945) ("[I]t is a settled 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.").

The Governor/FWP's interpretation is confirmed by other sections of the statutes. When **lands** are acquired by FWP and taken out of the tax base, there is provision for payments by FWP to the counties to supplement the tax base. § 87-1-603, MCA,

("payments to counties for department-owned land.") Such compensation is limited to counties in which the "Department **owns** any land" (§ 87-1-603(1), MCA.) In other words, in-lieu payments by FWP are not made for "interests in land" resulting from FWP's acquisition of conservation easement. It is limited to "department-owned land." This statutory language further illustrates that the legislature made and understood the distinction between lands "owned" by FWP (i.e. "the land acquisition") and "interests in land" covered by conservation easements.

Further evidence of the legislative intent to distinguish between land acquisition and conservation easements is found in a spending bill passed by the 2015 Legislature that appropriates spending authority for Habitat Montana. The Legislature provided that such appropriations are to be used "for purposes of land leasing, easement purchase, or development agreements **and may not be used to purchase land** except in cases where the department is currently negotiating such purchase." Habitat Montana at p. 12 (emphasis added). In other words, the

legislature expressed a decided preference in favor of conservation easements (i.e. "interests in land") as opposed to "land acquisition." In short, there is an important statutory difference between conservation easements and "land acquisition"—one that the Montana Legislature has understood and respected for years.

This distinction is lost in the Opinion, however, which falsely equates conservation easements with "land." In doing so, the Opinion makes it harder for landowners to exercise their private property rights and creates a bleak future for conservation easements in Montana.

B. The legislative history of § 87-1-209, MCA, supports Governor/FWP's interpretation.

The legislature never intended for the Land Board to have the final say on conservation easements. Indeed, FWP has closed conservation easements in the past without seeking the Land Board's approval. Although FWP began bringing conservation easements to the Land Board in the 1990s, no legal requirement necessitated this change. It simply became a practice, without any legal explanation. One can understand why. Some early projects involved DNRC-administered state trust lands, which did

necessitate Land Board review. As projects began to focus entirely on private land, briefings to the Land Board added public awareness to the projects with no costs to program administration. So long as the Land Board deferred to FWP's expertise and deep involvement in overseeing these conservation easements, the practice of taking these projects before the Land Board never raised the question of whether the practice was founded on custom or law.

Since 2017, however, the Land Board has rejected or indefinitely delayed half of the conservation easements presented. This change does raise the question, however, because it was not the scenario contemplated by those who created § 209.

The term "land acquisition" is not defined in the Code. The Opinion relies on the testimony regarding three bills pertaining to oversight of FWP land acquisitions, HB 251, HB 766, and HB 526. Opinion, ¶ 39-40. The first two were introduced in 1981. HB 251 died in committee, while HB 766 was passed after it was amended to provide for Land Board approval of FWP land acquisitions involving more than 100 acres or $100,000.

The Opinion gives a misleading picture of then-FWP director Jim Flynn's testimony in opposition to HB 251, which failed. The Opinion claims that Flynn testified in opposition and offered written testimony, including:

> "Passage of this bill will affect all acquisitions by the department regardless of the purpose for the acquisition."
>
> And:
>
> "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."

Opinion, ¶ 38 (quoting House Minutes of the Meeting of the Fish and Game Committee, Ex. 2 at 2, 4 (Jan. 24 1981)).

The entirety of Flynn's testimony on this bill bears reading closely, because it does not do the work the Opinion asks of it. The Opinion claims that the quote shows that Flynn "expressly acknowledged" that the statute encompasses "land acquisition" and applies to conservation easements. But the quote used was taken out of context. The Opinion incorrectly concludes that Flynn's testimony was intended to encompass conservation easements. In context, Flynn was discussing the effect that

legislative approval (proposed in HB251) of FWP land acquisitions would have on the Department's financial ability to make acquisitions elsewhere. He argued that the delay involved in seeking legislative approval would unreasonably raise the price of FWP land purchases. In a time of limited budgets, he testified, this would have the effect of decreasing FWP's financial ability to make all other kinds of acquisitions as well, **including conservation easements**. Again, to the extent the Court finds legislative history useful in its analysis, careful parsing of Flynn's statements on HB251 is useful, particularly because of the contrast between Flynn's actual testimony and the way his statements are used in the Opinion.

At the time conservation easements were relatively uncommon, and they had little to do with the tax issue underlying the bills. Flynn's intent was clearly to protect FWP's land acquisition discretion and express his concern that FWP's ability to purchase conservation easements would also be adversely affected.

The Opinion also misrepresents Flynn's testimony on HB 526. The Opinion quotes Flynn as stating that the "final step was review by the State Land Board . . . ." Opinion, ¶ 40 (quoting House Minutes of the Fish and Game Committee at 4 (Feb. 17, 1987)). The context of that statement, however, shows that Flynn was clearly concerned about "stacking another level of approval on the department's land purchases." (See Appendix to Governor/FWP's brief, 7.) He believed that taking his decision to the Fish & Game Commission for their approval should be enough, and that additional oversight of the Land Board was unnecessary, even for "land acquisitions." He was concerned that "to the extent that a willing seller appears with the potential for protecting wildlife habitat and providing fishing and other recreation opportunity . . ., this bill will add to the bureaucracy necessary in making that acquisition." Thus, contrary to the Opinion's claim that Flynn's testimony supports the Land Board's supposed authority, Flynn was arguing forcefully that that oversight was unnecessary for even "land acquisitions." While the law ultimately provided that the Land Board would have limited

oversight over certain "land acquisitions," Flynn would have clearly opposed the Opinion's attempt to broaden the scope of the Land Board's power. And, as documented in the Governor/FWP's brief, at least twice during this same time period, Flynn directed the closure of FWP conservation easements without Land Board approval precisely because they were not "land acquisitions." This is a distinction well known to land managers, property owners, and sportsmen alike.

Lest there be any remaining doubt as to Mr. Flynn's position, he has since expressly clarified his position: "From my perspective as director, conservation easements are not land acquisitions." Exhibit 11, 2 of Governor/FWP's brief. He explained, "If I had the knowledge in 1981 that I had in 1986[,] my testimony in 1981 would have addressed only land acquisitions because FWP doesn't pay taxes on conservation easements . . . . As I became more familiar with conservation easements during my tenure, I understood that conservation easements and land acquisition are two completely different concepts." *Id.* Flynn concluded that "conservation easements were not 'land acquisitions' and therefore

did not need Land Board approval." *Id.* Flynn's position could not be clearer. To the extent that the Opinion relies on his testimony to support its position, the Opinion is in error.

CONCLUSION

PLWA is deeply concerned that the Opinion will stifle the Habitat Montana program to the detriment of all those who use and enjoy outdoor recreation. This program is critical to keeping agricultural land in the hands of Montana families. Of course, it also has the added benefit of being an invaluable public access tool. These conservation easements are purchased for their present and potential wildlife and recreational values. The Opinion will undermine FWP's ability to use conservation easements to benefit all Montanans, landowners and public land users alike. And it does so by transforming a custom into a requirement of law. The custom may have made sense in the past, but it cannot change what the statutes require. Unless this Court reverses the Opinion, the pending easements, and untold more in the future, risk an unlawful blockade before the Land Board. Even the present uncertainty around requirement procedures threatens

the viability of present and future projects. As a member-funded public access non-profit, PLWA supports the petition to put the power to approve Habitat Montana conservation easements back where it belongs. Thus, PLWA respectfully requests that this Court grant Governor/FWP's request for declaratory relief.

November 13, 2018.

GOETZ, BALDWIN & GEDDES, P.C.

By: */s/ James H. Goetz*
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CERTIFICATE OF COMPLIANCE

The Rules of Appellate Procedure are not clear to the undersigned as to the word limit for an amicus brief supporting original jurisdiction. Rule 11(4)(a) provides for a 5,000 word limit for amicus briefs. However, Rule 14 limits the petitioner's brief in an original proceeding to 4,000 words. Rule 14(9)(b). In any event, this brief complies with the more restrictive word limit of 4,000 words because the foregoing brief is proportionally spaced, printed in 14-point Century (a Roman-style, non-script) type-face, is double spaced, and is 3,727 words, excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance.

DATED this 13th day of November, 2018.

By: */s/ James H. Goetz*