MEMORANDUM

To: Martha Williams, Director
From: Zach Zipfel, Agency Legal Counsel
Re: Land Board Approval of Conservation Easements
Date: March 23, 2018

Question Presented

Whether, Mont. Code Ann. § 87-1-209 requires the Department of Fish, Wildlife and Parks ("FWP") to obtain Land Board approval for conservation easements?

Brief Answer

While the Department has taken conservation easements over 100 acres or $100,000 in value to the Land Board out of courtesy, the plain language of Mont. Code Ann. § 87-1-209, as well as other statutes, does not require Land Board approval for FWP to acquire or hold a conservation easement.

Discussion

Title 87

Mont. Code Ann. § 87-1-209, **Acquisition and sale of lands or waters**, subsection (1) provides:

> Subject to *87-1-218* and subsection (8) of this section, the department, with the consent of the commission or the 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). Mont. Code Ann. § 87-1-218, **Notice of proposed land acquisitions**, subsection (1) requires that, "For *all land acquisitions* proposed pursuant to 87-1-209, the department shall provide notice to the board of county commissioners in the county where the proposed acquisition is located." (Emphasis added). Among other things, this notice "must include"

> 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….

Mont. Code Ann. § 87-1-209(3)(c) (emphasis added). Notably, by statute, the Department does not pay taxes on conservation easements. *See* Mont. Code Ann. § 76-6-208(1). It does, however, pay taxes on those properties it owns in fee.

Mont. Code Ann. § 87-1-603 uniformly speaks of the Department "owning" or "purchasing" land and also sets out various guidelines for the Department when paying taxes. It also provides exceptions to when the Department must pay taxes.

Read together, §§ 87-1-209, 87-1-218, and 87-1-603 provide insight into the meaning of the reference in § 87-1-209 to "land acquisition." Both -209 and -218 refer to "land acquisition" by the Department. Section -218 further requires a notice be sent to counties for Department "land acquisitions." Those notices "must" include an estimate of property taxes to be paid on the "proposed acquisition." As indicated above, by statute, the Department does not pay taxes on its conservation easements. It does pay taxes on its fee properties. Consistent with this reading, § -603 spells out circumstances under which the Department pays taxes on properties it "owns" or is "purchasing." The implication from these statutes is that "land acquisition" means property the Department owns or is purchasing in fee and is, thus, obligated for payment of taxes. Indeed, if "land acquisition" meant something less than fee title, why would the Department be required in § -218 to provide an estimate of property taxes payable on the property in its notice to the county?

This is also consistent with a plain reading of § 87-1-301, which sets forth the powers and duties of the Commission and which provides that the Commission, "shall approve *all acquisitions* or transfers *by the department of interests in land* or water…." The Legislature explicitly gave the Commission broader responsibility vis-à-vis Department acquisitions than it gave the Land Board. The Commission must approve "*all* acquisitions… of *interests* in land…." This includes all means of acquiring property interests set out in § 87-1-209, including "purchase, lease, agreement, gift, or devise and… easements upon lands…." It spans the range of outright fee title to something less such as a lease.

The Land Board's responsibility, however, is a subset of this, limited only to "land acquisition involving more than 100 acres or $100,000 in value." Basic rules of statutory construction dictate that where the Legislature uses different language, it must be assumed it was done so deliberately. Thus, while the Commission must approve "all acquisitions… of interests in lands…," the Land Board is limited to only actual "land acquisition" and only where such acquisition is "more than 100 acres or $100,000 in value." And, as discussed above, the strong implication in §§ 87-1-218 and -603, is that "land acquisition" means property which the Department "owns" or "purchases" and on which it pays taxes. This does not include conservation easements.

Legislative History

There is no Montana caselaw addressing this question. The legislative history of § 87-1-209, however, reinforces the idea that "land acquisition" means fee title purchase.

In 1981 the Legislature amended § 87-1-209, adding the language at issue here: "in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners(.)" During the session, there were two competing bills, both of which attempted to provide additional oversight of the Department's land acquisitions. HB 251 would have amended § 87-1-209 to grant approval authority to the Legislature for Department land acquisitions. As Rep. Aubyn Curtiss testified, both bills were a result 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." S. State Admin. Comm. Testimony of Rep. Curtiss (March 6, 1981). According to Rep. Curtiss, HB 251 was necessary because "the latitude given this Department to *buy* and sell *real estate* has not been in the best interest of Montana taxpayers, nor has it enabled the Department to better manage Montana's wildlife." *Id*. (emphasis added).

HB 251 failed, in large part because legislative oversight was impractical with the Legislature only convening every two years. In its place, HB 766 passed, granting the Land Board oversight for Department land acquisitions. Noting that the bill had been coming before the Fish and Game Committee for years, Chairman Ellison explained, "There is a reason. People want some elected official to take responsibility of land purchases." H. Fish and Game Comm. Minutes (February 19, 1981). Initially HB 766 assigned oversight to the governor. It was later amended to give that oversight to the Land Board.

HB 766 passed over opposition from FWP and Governor Schwinden. Larry Fasbender, on behalf of the governor, voiced opposition, explaining that, "This bill politicizes the purchase of state lands." S. State Admin. Comm. Minutes (March 20, 1981). FWP Director Jim Flynn testified that while, "The problem this bill seeks to address is the claimed excessive purchase of land by the Department of Fish, Wildlife and Parks," in fact, "The department does not purchase these lands without due consideration." *Id*. (enclosed testimony). Flynn further explained that, "The department is not going to have a major budget for large land purchases in the upcoming biennium, but to the extent that a willing seller appears with the potential for protecting wildlife habitat and providing fishing and other recreational opportunity… this bill will add to the bureaucracy necessary in making that acquisition." Senator Hammond noted that "the problem is that this bill points to the fact that it is necessary for the fish and game to own land. Why cannot they lease land and leave it on the tax rolls(?)." *Id*. Director Flynn "concurred that possible leasing will have to be investigated." *Id*.

Other Statutory Authority

The conservation easement statutes in Title 76 also refer to conservation easements as "interests in land," rather than outright "land acquisition." For instance, Mont. Code Ann. § 76-6-201 provides: "Where a public body acquires under this chapter *an interest in land less than fee,* this acquisition shall be by conservation easement." Likewise, § 76-6-207 requires conservation easements to be recorded in the same county where the property lies, "so as to effect the land's title in the manner of other conveyances of interest in land…." Similarly, in the Open-Space Land and Voluntary Conservation Easement Act, which authorizes public bodies to acquire conservation easements, the Legislature found "*the acquisition* or designation *of interests and rights in real property*," was in the public's interest. Mont. Code Ann. § 76-6-102(2)(f). The Act itself defines conservation easements as:

> 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) (emphasis added). This definition of conservation easements follows the Montana Supreme Court's characterization of easements generally as, "[A] non-possessory 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 land.'" *Kuhlman v. Rivera*, 216 Mont. 353, 358, 701 P.2d 982, 985 (1985) (discussing right-of-way easements).

Reading the statutes in this manner also brings them in line with the constitutional role and duties of the Land Board, which is to maximize income to the state from school trust lands. Consistent with this, § 77-1-202 makes clear that:

> The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:
> (a) secure the largest measure of legitimate and reasonable advantage to the state; and
> (b) provide for the long-term financial support of education.

Land held by the Department, however, is subject to a different set of statutory directives, as provided in § 87-1-209:

> (a) for fish hatcheries or nursery ponds;
> (b) as lands or water suitable for game, bird, fish, or fur-bearing animal restoration, propagation, or protection;
> (c) for public hunting, fishing, or trapping areas;
> (d) to capture, propagate, transport, buy, sell, or exchange any game, birds, fish, fish eggs, or fur-bearing animals needed for propagation or stocking purposes or to exercise control measures of undesirable species;
> (e) for state parks and outdoor recreation;
> (f) to extend and consolidate by exchange, lands or waters suitable for these purposes.

None of FWP's statutes direct the Department to derive income from the property.

Conclusion

Reading FWP's statutes, in conjunction with the conservation easement statutes, leads not only to the conclusion that conservation easements are "interests in land," but also that the Legislature made an intentional distinction between "interests" and outright "land acquisition." Reading these statutes against the backdrop of the Land Board's authority to manage state lands to

maximize income to the trust, leads to the conclusion that § 87-1-209 does not require the Department to obtain Land Board approval for conservation easements.