Montana Legislative Services Division

Legal Services Office

Room 110 Capitol Building * P.O. Box 201706 * Helena, MT 59620-1706 * (406) 444-3064 * FAX (406) 444-3036

August 25, 2010

Senator Rick Ripley
8920 MT Highway 200
Wolf Creek, MT 59648-8639

Re: Legal Opinion Regarding Legal Standing to Challenge Land Board Action

Dear Senator Ripley:

Pursuant to your request, this legal opinion letter supplements my June 10, 2010, memorandum[1] regarding whether the Board of Land Commissioners (Land Board) has authority to purchase land using proceeds from the approximately $41 million (plus interest) in compensatory damages from the Montana Supreme Court's decision in *PPL Montana, LLC v. State*, 2010 MT 64. This letter does not restate any of the applicable facts.

QUESTIONS

I am writing in response to your request for more detail regarding who may have standing to pursue a lawsuit against the Land Board and the amount of work involved in preparing for a trial. As part of your request you specifically asked the following:

(1) Does the Legislative Finance Committee (LFC) or the Environmental Quality Council (EQC) have standing in court?

(2) Does any citizen or group of taxpayers in Lewis and Clark County have standing in court?

(3) How long would it take to file an injunction?

SUMMARY ANSWERS

(1) The LFC and the EQC do not have express statutory authority to pursue an injunction or a declaratory relief action. However, Montana law provides that a party can gain standing by showing a threatened injury to a property right or a civil right that is distinguishable from an injury to the public generally. As applied here the LFC could allege that it has general oversight over state fiscal matters and that committee members will have fewer

[1] A copy of this memorandum is available on line at:
www.leg.mt.gov/content/Publications/fiscal/interim/financemty-june2010/2010-06-09-PPL-legagl-opinion.pdf

state funds to appropriate during the next session. It is harder to formulate a threatened injury for the EQC. Due to the uniqueness of this issue in Montana, it is impossible to predict whether a court would grant the LFC standing.

(2) A holdover senator or an unopposed legislator may be able to show a threatened injury and gain standing by alleging the fact that less money will be available for appropriation in the next session.

Lewis and Clark County, Missoula County, and Lake County may eventually be able to show a threatened injury and gain standing by alleging the inability to recover anticipated revenue once the parcels are purchased by the state and removed from the tax base. It may be too early for a county to institute a lawsuit at this time.

Taxpayers in Lewis and Clark County, Missoula County, and Lake County may eventually be able to show a threatened injury and gain standing by alleging that property taxes will go up when property is removed from the tax base. It may be too early for a taxpayer to institute a lawsuit at this time.

(3) A court action can be commenced in District Court by filing a complaint seeking injunctive and declaratory relief. The process of filing the complaint is relatively simple and can be completed in about a week, but the lawsuit itself would take considerable staff resources.

It is also possible that an original jurisdiction action could be commenced in the Montana Supreme Court. The Legal Services Office would need about a week to prepare the petition. A Supreme Court action could go forward using fewer staff resources, but the Supreme Court may decline to accept jurisdiction.

ANALYSIS

A. AUTHORIZATION TO SUE AND STANDING.

Courts evaluate and address actual controversies including a past, present, or threatened injury to a property or civil right. However, courts tend to exercise caution in disputes between the Executive and Legislative Branches.[2] This concept dates back to 1803 when the U.S. Supreme Court declared that it will not encroach on political disputes unless there is a legal issue.[3]

The Land Board's classification of the anticipated revenue as deriving from a "nonstate" source, exempt from the Legislature's constitutional appropriation power, could have a political element. Consequently, a court would need to determine whether a plaintiff has sufficient standing to institute a lawsuit. This section analyzes whether the LFC has standing. Additionally, it addresses briefly whether a citizen, county, or taxpayer has standing.

[2] *See, e.g., Raines v. Byrd,* 521 U.S. 811, 819-20 (1997); *Bennett v. Napolitano,* 81 P.3d 311, 316 (Ariz. 2003).
[3] *Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 170, 2 L. Ed. 60, 71 (1803).

1. Statutory Language Regarding Legislative Finance Committee Legal Actions.

The Montana Supreme Court can evaluate statutes to determine whether the Legislature conferred standing on a particular party.[4] However, a statutory grant of authority is not required. The LFC is primarily responsible for reviewing state government fiscal matters.[5] It does not have the power to exercise control over the proper expenditure of state funds by the Executive Branch.[6] Likewise, the LFC does not have express statutory authority to pursue a declaratory judgment or injunction action against the Land Board.

The LFC has statutory authority to engage in two types of lawsuits. Pursuant to section 17-7-405, MCA, any budget amendment that is not certified according to the standards and procedures set out in law may be declared void in its entirety by a court of competent jurisdiction on complaint of the LFC. Additionally, pursuant to section 17-8-103, MCA, it is unlawful for state entities and individuals having charge of the disbursement or expenditure of the income provided by legislative appropriation or otherwise, to expend, contract for the expenditure of, or incur or permit the incurring of any obligation whatsoever, in any 1 year, in excess of the legislative appropriation, except as specifically provided by law. When a violation of section 17-8-103, MCA, occurs, the LFC (or any taxpayer) can bring a personal liability action against a "member of a board of trustees or any person, officer, or employee" in District Court.[7] This type of action is different from an injunction or a declaratory relief action, as it seeks compensation from an actual person. Consequently, the LFC cannot gain standing in a declaratory judgment or injunction action unless it can show a threatened injury, as described in the next subsection.

2. The Principle of Standing and the Threatened Injury Requirement.

The Montana Supreme Court has held that "to establish standing to bring suit the complaining party must (1) clearly allege past, present, or threatened injury to a property right or a civil right, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party."[8] Standing is a "threshold jurisdictional question" especially in those cases where a statutory or constitutional violation is alleged to have occurred.[9] "The injury alleged must be personal to the plaintiff as distinguished from the community in general. Otherwise stated, the challenged action must result in a 'concrete adverseness' personal to the party staking a claim in the outcome."[10]

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[4] *See, e.g., Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 38, 356 Mont. 41, 230 P.3d 808.
[5] *See, e.g.,* §§ 2-17-522 (review of information technology plan), 5-11-105 (review classification and pay of legislative branch employees), 5-12-205 (preparation of recommendations to legislative committees), 17-7-138 (review of proposed operating budget changes), 17-7-140 (review of proposed reductions in spending), 17-7-402 (review of budget amendments), MCA.
[6] *State ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 478, 543 P.2d 1317, 1321 (1975); *see also* § 17-7-404, MCA (no authority to approve or deny budget amendments).
[7] § 17-8-104(1)(a), MCA.
[8] *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d. 1048 (citations omitted).
[9] *Id.* ¶ 7 (citation omitted).
[10] *Id.* (citations omitted).

a. Committee Standing.

Given the above, if the LFC seeks an injunction and/or declaratory relief it would need to allege a threatened injury that is distinguishable from an injury to the public. Presumably the injury could be based on the fact that the LFC has general legislative oversight of state fiscal matters. The fact that the LFC has statutory authority to pursue a personal liability action shows the high regard that the Legislature has for the bipartisan committee.[11] Additionally, the LFC could allege that committee members will have fewer state funds at their disposal during the next legislative session. Such a claim goes to the personal nature of the injury. Indeed, all legislators have an opportunity to vote in their respective chambers regarding appropriations. Lastly, the LFC could argue that the Montana Supreme Court previously allowed it to intervene in a 1975 lawsuit regarding legislative appropriation of private money and financial conditions imposed on the Board of Regents.[12]

In the event the LFC files a request for an injunction and/or declaratory relief, the Land Board could argue that the LFC does not have express statutory authority to pursue a lawsuit. Additionally, the Land Board could allege that the LFC as a whole would not suffer a personal injury. While the LFC would have some strong arguments, there is no guarantee that it would have standing in court. However, because this is a fiscal issue the LFC is in a better position to allege an injury than the EQC. The standing issue could compose a large part of any committee litigation.

b. Citizen Standing.

As part of your question you asked whether any citizen or taxpayer would have standing. The answer to your question depends on whether the "citizen" can sufficiently allege a personal injury beyond the common interest of all citizens and taxpayers, although the injury does not need to be exclusive to the complaining party.[13] I can think of at least three groups that could allege a personal injury, but only the courts can determine if the injury is sufficient to confer standing. These groups include (1) holdover senators and unopposed legislators, (2) counties that may need to raise mill levies when the Land Board purchases are removed from the tax base, and (3) taxpayers in the counties where mill levies are likely to go up.

i. Legislator Standing.

The question of whether a legislator can have standing was previously considered by the U.S. Supreme Court in *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, 21 Kansas state senators sued the Secretary of the Senate of the State of Kansas in an attempt to stop an endorsement of an amendment to the U.S. Constitution.[14] Standing to bring the lawsuit was challenged on the ground that the legislators did not have an adequate interest in the dispute.[15] Nevertheless, the U.S. Supreme Court determined that given the fact that the legislators' votes should have

[11] *See* § 17-8-104(1)(a), MCA.
[12] *Board. of Regents v. Judge*, 168 Mont. 433, 436, 543 P.2d 1323, 1326 (1975).
[13] *Fleenor*, ¶ 9.
[14] *Coleman*, 307 U.S. at 435-36.
[15] *Id.* at 438.

defeated the measure, there was a "plain, direct and adequate interest in maintaining the effectiveness of their votes." [16]

Fifty-eight years after *Coleman*, the U.S. Supreme Court considered legislative standing again in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, four Senators and two Congressmen who voted against the Line Item Veto Act challenged it as unconstitutional.[17] The Act passed in the Senate by a vote of 69-31, and it passed in the House of Representatives by a vote of 232-177.[18] The Court held that the Congressmen lacked standing.[19] In making this determination the Court stated: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."[20]

The *Raines* case was cited by the First Judicial District Court of Montana in *Cobb v. State* (2007), when Judge Thomas C. Honzel determined that Senator John Cobb did not have standing to challenge how a state statue regarding a property tax rebate was being implemented.[21] The court reasoned that Senator Cobb did not challenge the constitutionality of the statute and he did not allege a particular injury to his property rights or civil rights.[22] There is no mention in the opinion of whether Senator Cobb alleged that he would be deprived of appropriating funds in the future, but I suspect this argument was not made due to the fact that he did not serve in the following session.[23] Arguably *Raines* and *Cobb* are distinguishable from the facts at hand. The holding in *Raines* is based on the principle that a complaint must establish that plaintiff has a personal stake in the alleged dispute and that the alleged injury is particularized as to the plaintiff.[24] The plaintiffs in *Raines* had no particular stake in the dispute; they simply had voted against the legislation being challenged. Furthermore, Senator Cobb did not allege future vote dilution.

If the Land Board acts as expected, the Legislature as a whole and all future legislators will not have the opportunity to appropriate approximately $41 million (plus interest) and they will be removed from the decision process regarding where the money can be expended. This is different from challenging a political loss on a piece of legislation and is somewhat similar to the alleged vote nullification in *Coleman*.[25] As such, a holdover senator or an unopposed legislator may have standing in court regarding the constitutionality of the Land Board's proposal.[26]

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[16] *Id.* The U.S. Supreme Court has determined that the holding in *Coleman* "stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997).
[17] *Raines*, 521 U.S. at 814.
[18] *Id.*
[19] *Id.* at 830.
[20] *Id.* at 819.
[21] *Cobb v. State*, Docket No. CDV-2007-835, 2007 Mont. Dist. LEXIS 580, *6.
[22] *Id.* at *4-5.
[23] *See* www.leg.mt.gov/css/Sessions/61st/roster.asp?HouseID=0&SessionID=94 (Montana Legislative Roster for the 2009 Regular Session).
[24] *Raines v. Byrd*, *supra*, 521 U.S. at 819.
[25] *See also Hendrick v. Walters*, 865 P.2d 1232, 1235-40 (Okla. 1993) (reasoning that a senator who sued to determine whether the governor was validly holding office had standing); *Dodak v. State Admin. Bd.*, 495 N.W.2d

ii. County or Taxpayer Standing.

The Land Board's resolution dated May 17, 2010, directed the Department of Natural Resources and Conservation (DNRC) to undertake the necessary steps to purchase parcels of land that may be acquired with the proceeds of the award of compensatory damages, including appraisal and further due diligence.[27] The lands to be evaluated for purchase included approximately 930 acres in Lewis and Clark County, approximately 34,300 acres in Missoula County, and approximately 18,940 in Lake County.[28] The DNRC estimates that the county taxes for these parcels are $930, $46,508, and $25,000, respectively.[29]

Generally speaking, when the state purchases a parcel of property it is no longer subject to taxation by a county.[30] However, the county does not automatically forgo the lost revenue for an indefinite time period. Pursuant to section 15-10-420(1), MCA, a governmental entity that is authorized to impose mills may impose a mill levy sufficient to generate the amount of property taxes actually assessed in the prior year plus one-half of the average rate of inflation for the prior 3 years. This gives a county the ability to recover lost revenue by increasing the amount of mills imposed on the taxpayers. The taxpayers in these counties, in turn, end up paying more in property taxes.

As applied here, property the Land Board purchases will be removed from the tax base. There is no guarantee that the Land Board will purchase property in Lewis and Clark County, Missoula County, or Lake County. Yet in order for a county to have standing, it would need to show a sufficient threatened injury, such as the inability to quickly recover the loss in the tax revenue. A court may be reluctant to allow a county to go forward with litigation until there is more certainty in regard to what parcels will be purchased and how much revenue will be lost. Likewise, taxpayers in Lewis and Clark County, Missoula County, and Lake County may not be able to allege a threatened injury at this time as there is no guarantee which counties will be impacted. This type of generalized injury typically would demonstrate that the injured party lacks standing.

In conclusion, standing to pursue an injunction and/or declaratory relief would likely become an issue for any party. The more concrete the injury, the more likely it is that a court will accept

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539, 541-46 (Mich. 1993) (reasoning that the chair of the house appropriations committee had standing to challenge administrative board that attempted fund transfers without the chair's approval).

[26] It is interesting to note that standing was not raised as an issue by the Montana Supreme Court when two Montana senators instituted a declaratory judgment action against the Department of Administration alleging that the State Senate has the right to determine where it will sit. *Goodover v. Dept. of Admin.*, 201 Mont. 92, 97, 651 P.2d 1005 (1982).

[27] *See* www.leg.mt.gov/content/Publications/fiscal/interim/financemty-june2010/ppl-exhibits.pdf

[28] *Id.*

[29] *Id.*

[30] § 15-6-201(1)(a)(ii), MCA.

jurisdiction. While not discussed in this memorandum, perhaps the best party to allege an injury would be the Legislature as a whole, but this would take a resolution authorizing a lawsuit.[31]

B. POTENTIAL COURT OPTIONS AND TIMING.

As part of your question you asked how long it would take to file an injunction against the Land Board. There are generally two forums available to a plaintiff: a District Court and the Montana Supreme Court. An action in the Montana Supreme Court may be preferable as it would cost the parties less money. On the other hand, if the Montana Supreme Court denies jurisdiction the process would be more time-consuming and more expensive. Both of these options are briefly discussed in this section.

1. District Court Action.

A District Court action is commenced when a party files a complaint.[32] The proper place for trial in an action against the state is in the county in which the claim arose or in Lewis and Clark County.[33] Additionally, in an action brought by a resident of the state, the county of the plaintiff's residence is also a proper place of trial. Once the complaint is filed the Land Board would have 40 days to respond unless the court ordered another deadline.[34] In the event the Land Board started to go forward with a purchase during the litigation, a plaintiff could seek a temporary restraining order in an attempt to stop the process, but it would be valid for only 10 days.[35] During this timeframe the court could evaluate the merits of the application for an injunction.[36]

The actual complaint could be drafted and filed in about a week. Eventually hearings would take place and a variety of motions could be filed, including legal arguments regarding standing and summary judgment. The proceedings would take considerable staff resources, and either side could eventually appeal the result to the Montana Supreme Court.

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[31] The Forty-Second Legislative Assembly introduced and passed a bill authorizing the Attorney General to institute a declaratory relief action against the Cascade County Clerk and Recorder. Chapter 3, Laws of 1971; *see also Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 481 P.2d 330 (1971). While this was a bill, other legislatures have instituted lawsuits by resolutions. *See, e.g., Forty-Seventh Legislature v. Napolitano,*143 P.3d 1023, 1025 (Ariz. 2006) (each chamber of the Arizona Legislature authorized its presiding officer to bring an action on behalf of the Legislature to challenge the constitutional validity of the Governor's item veto); *Colorado General Assembly v. Lamm,* 704 P.2d 1371, 1374 (Colo. 1985) (reasoning the Colorado Legislature had standing to challenge the validity of the governor's vetoes). The Joint Rules of the Montana Legislature do not specifically address the filing of a lawsuit, but they do provide that a joint resolution may contain a "request of the Legislature." Joint Rule 40-60(a). Moreover, the Joint Rules could be amended to specifically cover the filing of a lawsuit. Joint Rule 40-60(d).

[32] M. R. Civ. P. 3.

[33] § 25-2-126, MCA.

[34] M. R. Civ. P. 12(a).

[35] §§ 27-19-314, 27-19-316, MCA

[36] § 27-19-314, MCA.

2. Supreme Court and Original Jurisdiction.

On rare occasions the Montana Supreme Court will accept original jurisdiction in a case instead of reviewing the District Court record.[37] Assumption of original jurisdiction is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate.[38] A petition seeking original jurisdiction and all supporting papers must set out why the Court should accept jurisdiction, the legal issues anticipated to be raised, and the legal authority for accepting jurisdiction. Upon the filing of the petition the Court could then order the Land Board to file a summary response regarding the legal issues and whether original jurisdiction is appropriate.[39] The timelines for filing a response and all other proceedings would be set by the Court, including possible briefing and oral argument.

Both the Legislature as a whole and the LFC have been involved in original jurisdiction proceedings.[40] As applied here, there is a constitutional issue of major statewide importance and the case involves legal questions of statutory and constitutional construction. Nonetheless, the Supreme Court may decline original jurisdiction if a District Court action could resolve the issues in a timely manner. As it stands, a District Court may have enough time to address the issue but may not have enough time in the future.

An original jurisdiction action could take less overall staff time, but it would be preferable to have at least a week to prepare the petition. There is also the risk that the Supreme Court would deny jurisdiction, in which case a District Court action would need to be pursued.

Thank you for the opportunity to provide you with this analysis. Please let me know if you have any additional questions or concerns.

Sincerely

Jaret R. Coles
Legislative Staff Attorney

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[37] The Supreme Court is an appellate court but is empowered by Article VII, Sections 1 and 2, of the Montana Constitution to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. M. R. App. P 14(1).
[38] M. R. App. P. 14(4); *see also Montanans for the Coal Trust v. State*, 2000 MT 13, ¶ 27, 298 Mont. 69, 996 P.2d 856.
[39] M. R. App. 14(7).
[40] *State ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 543 P.2d 1317 (1975); *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 481 P.2d 330 (1971).