

*November 10, 2015
M. C. ...*

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

Montanans for The Responsible Use of the
School Trust,
Plaintiff,
and

Montana Board of Regents of Higher
Education

Intervenor-Plaintiff,
vs.

State of Montana,
Defendant,
and

Montana State Leaseholder's Association,
Intervenor-Defendant.

Cause No. BDV-2012-39

**DECISION & FINAL
JUDGMENT ON
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT**

This matter was commenced on January 13, 2012, challenging the constitutionality of Senate Bill 409, 2011 Legislature, seeking various relief, including a preliminary injunction. Intervenor Board of Regents ("Regents") joined

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this matter on January 23, 2012 by complaint in intervention. The Montana State Leaseholder's Association ("MSLA") intervened as a defendant on January 25, 2012. Plaintiff ("MonTRUST") amended its complaint on February 13, 2012 to include, *inter alia*, claims against various administrative rules and practices by the State of Montana.

The preliminary injunction was heard by the Court on February 15, 2012. The Court entered its order granting plaintiff's motion for preliminary injunction on April 5, 2012 (Dkt. # 53), in substance, preliminarily enjoining implementation of SB 409. Subsequently, MSLA's motion for summary judgment was heard and denied. Thereafter, no further proceedings have been held by the Court in this matter.

Recently, the parties have filed various documents with the Court, including Regents' motion for summary judgment, joined by MonTRUST, and two different signed versions of settlement agreements. Upon hearing the summary judgment motion, and based on the most recently filed Settlement Agreement, *executed by counsel for all parties*, the Court enters the following decision and judgment, finally disposing of this matter.

I. INTRODUCTION

A. The parties' Settlement Agreement was entered by and between Plaintiff Montanans for the Responsible Use of the School Trust ("MonTRUST"), Intervenor-Plaintiff Montana Board of Regents of Higher Education ("Regents"), Intervenor-Defendants Montana State Leaseholders Association, and Defendant State of

Montana ("State"), acting through the Board of Land Commissioners ("Land Board") and the Department of Natural Resources and Conservation ("DNRC"). The Board of Land Commissioners has ratified this agreement.

II. BACKGROUND

B. The State, through the Land Board, administers approximately five million acres of land granted to Montana by the United States in trust for the support of public educational institutions under the Omnibus Enabling Act, 25 Stat. 676 (1889), as amended, 47 Stat. 150 (1932), and Article X, section 4 of the Montana Constitution.

C. The Montana Constitution and the Enabling Act require the State to exercise reasonable competence in administering the trust, to act with undivided loyalty in the interest of the beneficiaries as to matters involving trust property, to carry out the intentions of the grantor of the trust, to make the trust economically productive, and to be accountable to the beneficiary.

D. The State leases certain parcels of school trust lands to private parties for purposes of building and enjoying cabins and homes. For decades, the State leased these cabin sites for nominal rents, ranging from \$5 to \$150 per year. In 1981, recognizing that the nominal rents failed to maximize the return on the trust lands, the Land Board proposed administrative rules to require competitive bidding for the school trust cabin sites.

E. In response to opposition from cabin site lessees, the Montana Legislature enacted Section 77-1-208, MCA, in 1983, which prevented the use of competitive bidding for cabin site leasing and instead created a system of administratively

established rents set at 5% of the appraised value of the lot per year. This statute was later amended in 1989 to impose a rental ceiling of 3.5% of appraised value, as determined by the Department of Revenue during periodic reevaluations. Although this ceiling was removed in 1993, the Land Board continued to lease cabin sites at 3.5% by administrative rule.

F. In 1993, the State commissioned a study of the economic returns from school trust lands, commonly referred to as the Duffield Study. Based on the information available at the time, the study found that a reasonable return from the rental of cabin sites should be between 8% and 12% of appraised value.

G. MonTRUST filed a complaint in 1997 challenging the constitutionality of certain statutes concerning the school trust lands, relying in part on the Duffield study. MonTRUST is a nonprofit membership citizen's organization dedicated to protecting and advancing the appropriate use of Montana's school trust lands. The Montana Supreme Court concluded, based on the record, that the practice of charging 3.5% of the appraised value violated the State's duty as trustee of the school trust, and that issuing lease renewals at less than the fair market rental rate was unconstitutional, and affirmed the First Judicial District Court's permanent injunction to that effect (dated April 1, 1998).

H. After negotiated rulemaking, the Land Board adopted new regulations providing a general lease rate of 5% of the current Department of Revenue appraised property values, excluding improvements. Because of phase-in periods implemented by the State, however, few lessees ever paid five percent of appraised value.

I. After appraisals of the cabin leases conducted in 2009 indicated a large increase in lease fees, the DNRC adopted Alternative 3B, which allowed appraised values to be phased in over a number of years. Alternative 3B uses 5% of an adjusted appraised value based on average appreciation of state leases and increases annually.

J. The 2011 Montana legislature passed SB409, codified at §§ 77-1-208, 77-2-235, 77-1-236, and 77-2-318, which directed the DNRC to conduct a bidding process for currently vacant lots with an initial minimum bid of 2% of the appraised value of the lot.

K. The State commissioned Bioeconomics, Inc. to prepare an update to the Duffield study in 2011.

L. On January 13, 2012, MonTRUST initiated the civil suit underlying this case. Land Board is established by Article X, § 4, of the Montana Constitution, wherein it is granted the authority to direct, control, lease, exchange, and sell school trust lands. DNRC is a state agency created by § 2-15-104, MCA. DNRC is currently enjoined from instituting the new leasing rules promulgated under SB409 pending the resolution of this litigation.

M. Regents moved to intervene and filed a complaint in intervention. Regents is the governing body of the Montana university system. The Court granted Regents' request to intervene on Jan. 24, 2012.

N. MonTRUST filed its amended complaint on February 13, 2012.

O. MonTRUST and Regents sought declaratory and injunctive relief, alleging that SB409, enacted into law in 2011, now codified at §§ 77-1-208, 77-1-235, 77-1-

236, and 77-2-318, MCA, and the implementing administrative rules effective January 1, 2012 as ARM Title 36, Ch. 25, Subchapter 10, violated fiduciary, trust, and constitutional duties of the defendants.

P. MonTrust and Regents alleged that the implementing administrative rules—particularly Alternative 3B—fail to secure for the trust a full market value rate of return.

Q. The Montana Legislature moved to dismiss, asserting legislative immunity. Meanwhile, the Montana State Leaseholders Association (“MSLA”) successfully moved to intervene. MSLA is a non-profit association comprised of owners of cabin site leases. The parties then stipulated to amendment of the caption and clarified that the Montana Legislature was not a party or relator to the action, leaving only the State and MSLA as defendants.

R. The State filed its Answer to MonTRUST’s Amended Complaint on March 19, 2012, and its Answer to Regent’s Complaint-in-Intervention on February 29, 2012.

S. MSLA filed its cross-complaint against the State on April 13, 2012, requesting declaratory relief from administrative rules ARM 36.25.1016–1021. The State answered MSLA’s cross-complaint on May 1, 2012.

T. MSLA filed a motion for partial summary judgment on the facial constitutionality of § 77-1-235(1), MCA, on January 24, 2013. The motion was opposed by all other parties. MSLA’s motion was denied on April 25, 2013.

U. Bioeconomics created an addendum to its own 2011 study in 2015.

V. By their Settlement Agreement, MonTRUST, Regents, MSLA, and the State seek to resolve all of the claims between them.

III. COVENANTS

MonTRUST, Regents, MSLA, and the State agree as follows:

1. JURISDICTION AND VENUE: The Montana First Judicial District Court has personal jurisdiction over the parties and jurisdiction over the subject matter pursuant to Montana law. Venue is proper in the First Judicial District Court, Lewis & Clark County. The parties do not challenge the terms or validity of the Settlement Agreement or contest this Court's jurisdiction to enter or enforce this Settlement Agreement by Consent Decree in this or any subsequent proceeding arising from it.

2. PROVISIONS VOID: SB409 and the implementing regulations for SB409 are void and shall not be enforced or implemented. The following provisions of administrative Alternative 3B contained in MAR Notice No. 36-22-143, at 1 Mont. Admin. Reg. 40 (Jan 14, 2010) are void and shall no longer be enforced or implemented: New Rules III and XII.

3. PERMANENT INJUNCTION: Consistent with the Agreement, the parties agreed to a permanent injunction of the implementation of SB409, its implementing regulations, and those portions of Alternative 3B described in paragraph 2, above.

4. SUMMARY JUDGMENT: Regents, joined by MonTRUST, have moved for summary judgment declaring the provisions described in paragraph 2 unconstitutional. MSLA and the State do not oppose the motion. Applicability and implementation of the Settlement Agreement, based on the implementation provisions in paragraph 5 of the Agreement, is contingent upon receiving an order

granting summary judgment and a decree implementing the summary judgment. The parties intend that the Settlement Agreement shall be incorporated into any final judgment in this case.

5. IMPLEMENTATION: Upon the acceptance of the Settlement Agreement by a court of final jurisdiction, the State agrees to implement the following:

- a. Subject to paragraph 5(e) below, the State will offer all vacant cabin site leases that come up for competitive bid at the minimum rate of 6.5% of the appraised land value. Where the State has not received any bid to lease within 60 days in response to its initial offer, the State may then offer that lease at a minimum rate of 5% of the appraised land value. If no bid is received after an additional 60 days and the property is in a "neighborhood" (as that term is used in current DNRC practice) where vacancies are higher than 30%, DNRC may offer said cabin site leases for competitive bidding at less than 5%. In no case shall the annual rental rate be less than 3.5% of the appraised land value or \$800.00 per year whichever is higher.
- b. Subject to paragraph 5(e) below, all cabin site leases that are renewed without competitive bid shall be renewed at a rental rate no less than 5% of appraised land value or \$800.00 per year, whichever is greater.
- c. These changes to the minimum rental rates and bids will apply to all cabin site leases issued by DNRC after the acceptance of this Settlement Agreement by a court of final jurisdiction.

d. The State may implement these provisions and any judgment resulting therefrom with appropriate rule-making.

e. Two years from the acceptance of this Settlement Agreement by a court of final jurisdiction and every two years thereafter, the Land Board will review the data from all competitively-bid Montana cabin site leases and all non-competitively-bid Montana cabin site leases, complete a formal review by an appropriately qualified, professional economist, and consider whether to revise procedures and/or the rental rates described in paragraph 5(a) and (b) above. Based on the results of the review required in this paragraph, the Land Board commits to setting the rental rates for cabin site leases so as capture for the trust beneficiaries the full market value of such leases in order to maximize the cumulative long-term revenue from cabin sites without creating vacancy rates that are detrimental to the best financial interests of the trust beneficiaries, as required by the Montana Constitution and Enabling Act.

6. ATTORNEYS' FEES AND COSTS: The State has placed in escrow, as accrued funds committed by the State, the following funds for the payment of the Parties' reasonable attorney's fees: for MonTRUST in the amount of \$ 73,045.58 and for the Regents the amount of \$ 79,813.50. The State shall hold such funds in escrow as accrued funds, and such funds shall be released by the Department to the Plaintiffs upon the approval of this Consent Decree by this Court.

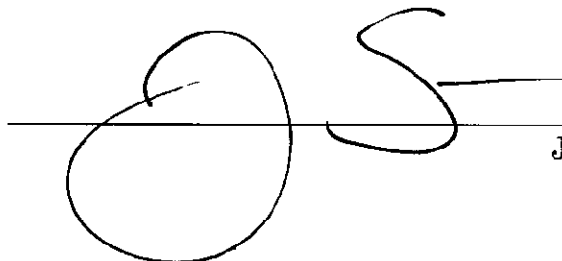
7. RELEASE AND COMPROMISE OF PAST CLAIMS: MonTRUST compromises, settles, and releases the State of Montana from those claims

described in paragraphs 34a, 34b, 34c, 35, and 36 of MonTRUST's Amended Complaint in this action with prejudice. All other claims of the parties shall be dismissed without prejudice.

Based on the above, and pursuant to the motion for summary judgment by Regents and MonTRUST, this Court hereby ORDERS, ADJUDGES, AND DECREES:

- 1) That the Court accepts and incorporates the parties' most recent Settlement Agreement, heretofore filed with the Court.
- 2) That plaintiff's motion for summary judgment is GRANTED. To wit, the statutory and administrative provisions described in the Covenants, paragraph III, subsection 2, above, are unconstitutional, void and of no further effect.
- 3) That the provisions of the parties' settlement agreement, set forth above in parts I through III, are incorporated herein, and enforceable as the decision and order of this Court.
- 4) That the decision of this Court, dated April 1, 1998 in Cause No. ADV 97-134 is not otherwise amended, altered or abridged by this decision and judgment.
- 5) Pursuant to the foregoing terms, this matter is hereby DISMISSED.

DATED: 11-10-15

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line extending to the right.

JEFFREY M. SHERLOCK
District Court Judge
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Ccs: Roy Andes
James H. Goetz
Tommy Butler
Peter G. Scott