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NANCY SWEENEY
CLERK DISTRICT COURT
C. Poluzak
FILED BY
DEPUTY

2012 APR -5 P 12:51

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

**MONTANANS FOR THE RESPONSIBLE
USE OF THE SCHOOL TRUST,**

Plaintiff,

and

**MONTANA BOARD OF REGENTS OF
HIGHER EDUCATION,**

Intervenor-Plaintiff,

v.

**STATE OF MONTANA, ex rel.
MONTANA LEGISLATURE, BOARD OF
LAND COMMISSIONERS, and
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION,**

Defendant,

and

**MONTANA STATE LEASEHOLDERS
ASSOCIATION,**

Intervenor-Defendant.

Cause No. BDV-2012-39

**ORDER ON MOTION FOR
PRELIMINARY
INJUNCTION**

26841

1 On February 15, 2012, the Court held a hearing on Plaintiffs' motion for
2 a preliminary injunction. Plaintiff Montana for the Responsible School Trust was
3 represented by Roy Andes, and Plaintiff-Intervenor Montana Board of Regents of
4 Higher Education was represented by Brian K. Gallik. Defendant State of Montana
5 was represented by Tommy H. Butler and Candice F. West, and Defendant-Intervenor
6 Montana State Leaseholders Association was represented by Peter G. Scott. At the
7 hearing, the Court received testimony from witnesses and received affidavits. In
8 addition, after conclusion of the hearing, the State Leaseholders Association submitted
9 a brief and affidavit.

10 BACKGROUND

11 The issue in this case is whether the Court should issue a preliminary
12 injunction against Senate Bill 409 (SB 409) from the 2011 Montana Legislature. SB
13 409 has found its way into Sections 77-1-208 and 77-2-318, MCA. The Montana State
14 Land Board has adopted rules to implement SB 409, and the Montana Department of
15 Natural Resources (DNRC), absent this Court's intervention, will begin to apply those
16 rules. The Court notes that the passage of SB 409 was opposed by DNRC's director,
17 Mary Sexton. In addition, the Governor refused to sign SB 409.

18 This case involves approximately 800 lease sites on school trust land
19 located primarily in northwest Montana. Generally, these lease sites are used for
20 cabins or second homes. On March 21, 2011, before the Senate Natural Resources
21 Committee, Director Sexton testified about SB 409. (Pl.'s Ex. 9.) In her testimony,
22 Sexton found that SB 409 would not achieve full market value on the trust lands.
23 Sexton also indicated that she felt that the Montana Supreme Court had prohibited any
24 lease rate for school trust lands receiving less than 3.5 percent of the appraised value of
25 the property.

1 The Court has received the fiscal note prepared for implementation of SB
2 409 for the 2013 biennium. (Pl.'s Ex. 3.) In that fiscal note, it is estimated that
3 implementation of SB 409 will reduce the school trust income as follows: FY 2013,
4 less \$1,724,427; FY 2014, less \$1,765,607; and FY 2015, less \$1,809,462. (Id. at 2.)

5 The Court has also had reference to what has been called the Duffield
6 Report. (Pl.'s Ex. 4.) This study was prepared by Bioeconomics of Missoula,
7 Montana, on September 16, 2011. The Duffield Report suggests:

8 1. Analysis of cabinsite transfer data for the period from 2003
9 through August 2011 suggests that many lease sales still result in positive
10 leasehold value to the seller. This indicates that the full market rental
11 rate is above the contract rental rate. In the most recent years' data
(2010-2011), the implied full market lease rate from the transfer is in the
12 rate of 5% to 7%.

13 3. Past and current examples of recreational lot leases by state
14 trusts, the federal government, and corporations and utilities support the
15 conclusion that market lease rates are generally above 5%.

16 (Id. at 18.) The study further suggests that SB 409 has the potential to lower both
17 current trust revenues and the rate at which the revenues grow in the future. (Id. at 19.)

18 The Court heard from Sheila Stearns, the Commissioner of Higher
19 Education for the State of Montana. Dr. Stearns testified that five Montana university
20 campuses are beneficiaries of the proceeds of leased state trust land. These proceeds
21 are pledged to various bonded building projects on the university campuses. Dr.
22 Stearns opined that if SB 409 were implemented, students would have pay higher fees
23 due to the loss of income to the school trust fund from implementation of SB 409.

24 The Court has also received the affidavit of Alan Nicholson, who has
25 extensive experience in commercial and residential real estate rentals. Nicholson
opines that if SB 409 were enacted, there is no reasonable prospect of the State
receiving full market rental value for its land. Nicholson points to three issues that he

1 has with SB 409. First, SB 409 would allow the lessee to terminate the lease without
2 any penalty or consideration. According to Nicholson, this is not a prudent thing for a
3 lessor to do, and SB 409 gives no matching right to the Lessor. Nicholson further
4 states that SB 409 allows a lessee to "time the market." Thus, the lessee can pick the
5 time to end his lease on a down-market time. In times of recession, this would mean
6 that fewer bids would be received, and any bids that would be received would be
7 depressed. However, the incumbent lessee could then lock in a new fifteen-year lease
8 term at recession rates. Nicholson suggests that SB 409 inappropriately gives no
9 similar right to the lessor. Finally, Nicholson is concerned about SB 409's requirement
10 that any successful bidder has to buy the improvements made by the incumbent lessee.
11 These values are not set at the time of bidding and could have a depressing effect on
12 bidding. According to Nicholson, in the normal scenario of a lease, improvements
13 revert to the lessor. Nicholson states that this provision in SB 409 makes the existing
14 lessee more likely to win in a bidding contest. (Nicholson Aff., at 2, 3.)

15 STANDARD OF REVIEW

16 An injunction is an order of the court requiring a party to refrain from a
17 particular act. Section 27-19-101, MCA. A preliminary injunction restrains a party
18 pending trial on the merits and is issued after notice and a hearing. BLACK'S LAW
19 DICTIONARY 800 (8th ed. 1999). The district court is vested with the discretion to
20 determine whether a preliminary injunction should issue, and this decision will not be
21 overturned except in instances of manifest abuse. *Sweet Grass Farms, Ltd. v. Bd. of*
22 *County Comm'rs*, 2000 MT 147, ¶ 20, 300 Mont. 66, 2 P.3d 825; *Porter v. K & S*
23 *P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981).

24 The Montana Code provides for the issuance of a preliminary injunction
25 in the following cases:

1 (1) when it appears that the applicant is entitled to the relief
2 demanded and the relief or any part of the relief consists in restraining
3 the commission or continuance of the act complained of, either for a
4 limited period or perpetually;

5 (2) when it appears that the commission or continuance of some
6 act during the litigation would produce a great or irreparable injury to the
7 applicant;

8 (3) when it appears during the litigation that the adverse party is
9 doing or threatens or is about to do or is procuring or suffering to be
10 done some act in violation of the applicant's rights, respecting the subject
11 of the action, and tending to render the judgment ineffectual;

12 (4) when it appears that the adverse party, during the pendency of
13 the action, threatens or is about to remove or to dispose of the adverse
14 party's property with intent to defraud the applicant, an injunction order
15 may be granted to restrain the removal or disposition;

16 (5) when it appears that the applicant has applied for an order
17 under the provisions of 40-4-121 or an order of protection under Title 40,
18 chapter 15.

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11 Section 27-19-201, MCA.

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The Montana Supreme Court determined that the "subsections of this statute are disjunctive, 'meaning that findings that satisfy one subsection are sufficient.' Consequently, only one subsection need be met for an injunction to issue." *Sweet Grass Farms*, ¶ 27 (citations omitted) (quoting *Stark v. Borner*, 226 Mont. 356, 359-60, 735 P.2d 314, 317 (1987)). "An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." *Id.*, ¶ 28 (quoting *Porter*, at 181, 627 P.2d at 839). "In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of the property or rights in status quo until trial, without expressing a final opinion as to such rights." *Id.* "'Status quo' has been defined as 'the last actual, peaceable, noncontested condition which preceded the pending controversy.'" *Id.* (quoting *Porter*, at 181, 627 P.2d at 839).

DISCUSSION

1 The starting point for our analysis must be the case of *Montanans for the*
2 *Responsible Use of the School Trust v. State*, 1999 MT 263, 296 Mont. 402, 989 P.2d
3 800 (*Montrust*). In *Montrust*, the Montana Supreme Court noted:

4 The State of Montana is a trustee of those lands (hereafter, the
5 school trust lands). Further, "The state board of land commissioners, as
6 the instrumentality created to administer that trust, is bound, upon
7 principles that are elementary, to so administer it as to secure the largest
8 measure of legitimate advantage to the beneficiary of it." The State
9 Board of Land Commissioners (hereafter, the Board) "owes a higher duty
10 to the public than does an ordinary businessman." Finally, Montana's
11 Constitutional provisions are "limitations on the power of disposal by the
legislature." One limitation on the legislature's power of disposal is the
trust's requirement that full market value be obtained for trust lands. See
Section 11 of the Enabling Act (as amended by the Act of May 7, 1932,
ch. 172, 47 Stat. 150 (1932)) (providing that "none of such lands . . .
shall ever be disposed of . . . unless the full market value of the estate or
interest disposed of, to be ascertained in such manner as may be provided
by law, has been paid or safely secured to the State").

12 *Montrust*, ¶ 14 (other citations omitted). The court also noted the impact of Article X,
13 section 11, of the Montana Constitution, which provides:

14 **Public land trust, disposition.** (1) All lands of the state that have
15 been or may be granted by congress, or acquired by gift or grant or
16 devise from any person or corporation, shall be public lands of the state.
They shall be held in trust for the people, to be disposed of as hereafter
17 provided, for the respective purposes for which they have been or may be
18 granted, donated or devised.

19 (2) No such land or any estate or interest therein shall ever be
20 disposed of except in pursuance of general laws providing for such
21 disposition, or until the full market value of the estate or interest
22 disposed of, to be ascertained in such manner as may be provided by law,
has been paid or safely secured to the state.

23 (3) No land which the state holds by grant from the United States
24 which prescribes the manner of disposal and minimum price shall be
25 disposed of except in the manner and for at least the price prescribed
without the consent of the United States.

26 The supreme court found that DNRC's policy of charging a rental rate of
27 3.5 percent of the appraised value was significantly below a fair market rental rate and
28 thus was unconstitutional. In addition, the court noted that the trust requires that the
29 State of Montana obtain full market value for cabin site rentals. *Montrust*, ¶ 32. The

1 court also noted that a statutory requirement holding that a new lease would not issue
2 until the new lessee shows that the old lessee has been paid the value of his
3 improvements was unconstitutional on its face. *Montrust*, ¶ 58.

4 Clearly, the State of Montana is obligated to obtain full fair market value
5 for these leased properties. Although there is some evidence to the contrary, the
6 overwhelming weight of the evidence, cited above, shows that SB 409 will not result in
7 the State obtaining full market value for its leased school trust lands.

8 The Court is cognizant of *County of Skamania v. State*, 685 P.2d 576
9 (Wash. 1984). That case was cited approvingly by the Montana Supreme Court in
10 *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985). In *Skamania*,
11 the Washington court was dealing with legislation that allowed lumber companies to
12 modify or default their contract obligations to purchase timber from state lands. The
13 court noted that the land in question was held by the state in trust for various
14 beneficiaries. The Washington Supreme Court imposed a duty of undivided loyalty on
15 a trustee. In other words, the trustee must act with undivided loyalty to the trust
16 beneficiary to the exclusion of all other interests and must see full value for the assets.
17 *Skamania*, at 580.

18 Here, the evidence would seem to show that SB 409 was enacted with as
19 much an eye towards helping lease holders as in getting full value for the state land.
20 This is not acting with undivided loyalty towards the beneficiaries of the trust.

21 Further, a trustee has a duty to act prudently. *Skamania*, at 582. This
22 requires the trustee to manage trust assets prudently, using reasonable diligence in
23 pursuant contract claims. The *Skamania* court noted that legislation enacted by the
24 Washington legislature released valuable contract rights held by the state to allow
25 timber companies to abandon their contracts. *Id.*

1 Applying these same principals to SB 409, we find several apparent
2 violations of a trustee's duty. First, SB 409 requires that a successful lessee buy an
3 incumbent lessee's improvements. Until the parties have arrived at a purchase price,
4 the incumbent lessee can stay on the property and pay the old rent. See SB 409 at §
5 3(4)(b)(i). Such a scenario was declared unconstitutional by *Montrust*. *Montrust*, ¶ 58.

6 Further, SB 409 suggests that in the absence of any competitive bid, a
7 lease must be based at least on 2 percent of the appraised value of the land. The
8 Duffield Report suggests that this 2 percent rate is well below market value. (Pl.'s Ex.
9 4., at 60.) *Montrust* seems to suggest that anything 3.5 percent and below is not
10 receiving fair market value.

11 SB 409 also allows a lessee to merely abandon a lease anytime during the
12 term of the lease with no consequence. This certainly would seem to breach the
13 trustee's obligation to act prudently towards trust assets.

14 Further, SB 409 allows an incumbent lessee, at any time during the lease,
15 to surrender the lease and offer it for competitive bidding. This allows the lessee to
16 time the rebidding of his lease during a recession which could result in a new 15-year
17 lease based upon recession prices. While such a procedure may be good for the
18 leaseholders, it appears to violate the trustee's obligation to act with the duty of
19 undivided loyalty towards the beneficiaries of the trust.

20 The above recitation shows a number of very troubling problems with
21 SB 409. The opponents of an injunction being issued suggest that these negative
22 impacts are speculative and may not occur in the future. However, as noted above, a
23 preliminary injunction is to preserve the status quo. Right now, the status quo is a
24 scenario that does not have SB 409 in operation and effect on these leases. In addition,
25 the Court could go so far as to say the 2 percent of appraised value minimum lease

1 suggested by SB 409 is, on the basis of the overwhelming evidence presented to this
 2 Court, nowhere near the fair market value of these leases. Further, if the Court allows
 3 SB 409 and its newly drafted regulations to go into effect, the trust may be subject to
 4 newly negotiated 15-year lease contracts that would go into effect absent a preliminary
 5 injunction. Clearly, the equities in this case lie in favor of the trust beneficiaries — the
 6 students of Montana.

7 **ORDER**

8 Based on the above, this Court hereby **ORDERS, ADJUDGES, AND**
 9 **DECREES** that a preliminary injunction shall go into immediate operation against
 10 Senate Bill 409 of the 2011 Montana Legislature. Pursuant to this preliminary
 11 injunction, no officer, agent, or employee of the State of Montana shall undertake any
 12 act to implement or effectuate any of the terms of Senate Bill 409. In addition, no rule
 13 or regulation adopted to implement Senate Bill 409 adopted by either the Montana
 14 State Land Board or the Department of Natural Resources and Conservation shall go
 15 into any force or effect pending the duration of this preliminary injunction.

16 This preliminary injunction shall remain in full force and effect pending
 17 the final outcome of this case.

18 DATED this 5 day of April 2012.

19
 20 
 21 **JEFFREY M. SHERLOCK**
 District Court Judge

22 pcs: Roy Andes
 23 James H. Goetz/Brian K. Gallik
 Tommy H. Butler
 24 Peter G. Scott/Murry Warhank

25 T/JMS/monttrust v mt legislature mot prelim inj.wpd