

BEFORE THE BOARD OF LAND COMMISSIONERS AND  
THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through VI and the amendment of ARM 36.25.1011 pertaining to the establishment of lease rental rates, lease assignments, and sale procedures for state cabinsites ) NOTICE OF ADOPTION AND AMENDMENT ) ) ) ) ) ) )

To: All Concerned Persons

1. On November 10, 2011, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-158 regarding a notice of public hearing on the proposed adoption and amendment of the above-stated rules at page 2347 of the 2011 Montana Administrative Register, Issue No. 21.

2. The department has adopted New Rules I (36.25.1016) through VI (36.25.1021), as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (36.25.1016) COMPETITIVE BIDDING

(1) through (3) remain as proposed.

(4) The asking price for the improvements on the cabinsite lot will be established per ARM 36.25.1005.

(4) and (5) remain as proposed, but are renumbered (5) and (6).

~~(6)~~ Where a lessee requests that the lease be competitively bid, that request will result in a change of the lease fee calculation methodology to that specified in ARM 36.25.1018. The competitive bidding for an existing cabinsite lease will occur during the period from April 1 through September 30 of each year. The number of leases available for bid statewide is at the discretion of the board, but shall be consistent with 77-1-235 and 77-1-236, MCA. The department may use the following standards to determine how many lease lots are available for bid.

(a) In any given ~~neighborhood~~ geographic location a maximum of three lease lots or ten percent of the total number of lease lots in that ~~neighborhood~~ geographic location, whichever is greater, may be available for competitive bid when the lessee requests that the lease be competitively bid.

(i) If ten percent of the lease lots in a ~~neighborhood~~ geographic location is a fractional number, the number shall be rounded down to the nearest whole number. After applying these criteria, if the requests to put lease lots out for bid exceeds ten percent or three of the total number of lots in a ~~neighborhood~~ geographic location, whichever is greater, the bid requests will be selected by a random drawing.

(7) through (11) remain as proposed but are renumbered (8) through (12).

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA

IMP: 77-1-235, 77-1-236, MCA

NEW RULE II (36.25.1017) ROLLING NEIGHBORHOOD GEOGRAPHIC LOCATION AVERAGE LEASE RATE

(1) By October 31 of each year, the department will establish a rolling neighborhood geographic location average lease rate for each neighborhood, or geographic location, to be used for the next billing cycle that begins January 1 of the following year. For the purposes of ARM 36.25.1016 through ARM 36.25.1021, two types of neighborhoods geographic locations shall exist in the land area administered by each unit office of the department within the northwest, southwest, and central areas of the department, and the land area administered by each area office within the northeast, southern, and eastern areas of the department:

(a) one neighborhood geographic location for cabinsites which are adjacent to water such as lakes, rivers, and streams; and

(b) one neighborhood geographic location for cabinsites which lack access to water such as lakes, rivers, and streams.

(2) A minimum of three winning bids are necessary to establish a rolling neighborhood geographic location average lease rate. The rolling neighborhood geographic location average lease rates will be determined as follows:

(a) the department will document the bid amounts for every successful cabinsite that is competitively bid;

(b) the rolling neighborhood geographic location average lease rate for a given billing cycle will be calculated using the competitive bid amounts from cabinsites in that neighborhood geographic location for the most recent three calendar years, or as of January 1, 2012, if three years have not yet elapsed from the effective date of these rules; and

(c) the winning bid amount for every cabinsite that is successfully bid will be divided by the most recent appraised value from the DOR for that cabinsite. The resulting rates will then be averaged together by neighborhood geographic location to determine the neighborhood geographic location rolling average lease rate for the next billing cycle.

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA

IMP: 77-1-235, 77-1-236, MCA

NEW RULE III (36.25.1018) LEASE FEE FOR BID CABINSITE LEASES UNDER ARM 36.25.1016 (1) remains as proposed.

(2) Where the lessee of a lease existing prior to May 12, 2011 ~~chooses to place the lease up for competitive bidding,~~ has a cabinsite competitively bid under ARM 36.25.1016, the annual lease fee for the first year will equal the bid amount.

(a) However, in subsequent years, the annual lease fee for that lease will equal the most recent appraised value of the cabinsite as determined by the DOR multiplied by the rolling neighborhood geographic location average lease rate effective for that year, plus an annual adjustment equal to the previous year's lease fee multiplied by the annual percentage change in the consumer price index (CPI) as provided in ARM 36.25.1001(9).

(b) The department will not add a CPI adjustment to the annual lease fee for the first annual billing following release of a new appraised value.

(3) The lessee of any currently leased cabinsite will have the ability, prior to renewal of the existing lease in effect as of the date of the adoption of ARM 36.25.1016 through 36.25.1021, to participate in the bidding method by applying on a form prescribed by the department. Once the current lease is renewed, or once a new 15-year lease is issued as part of the bidding process, a lessee will no longer have the option to switch to the bidding method during the term of a lease.

(a) Such an application will include an application fee and the requirement to be within deadlines prescribed by the department.

(b) The application must be accompanied by a supplemental lease agreement, which will describe the terms of the competitive bid process including the change in the lease fee which will be effective in the year following the lessee's application for competitive bidding.

(c) This one-time initial participation in the bidding method will require the lease fee to be calculated according to the applicable geographic location rolling average lease rate, or a rate of three percent if no geographic location rolling average lease rate has been established.

(i) A lease fee may be calculated using the geographic location rolling average lease rate in the lease year after the geographic location rolling average lease rate is established.

(d) Where the lessee of a lease existing prior to May 12, 2011, has a cabinsite competitively bid under ARM 36.25.1016, the annual lease fee for the first year will equal the bid amount.

(i) However, in subsequent years, the annual lease fee for that lease will equal the most recent appraised value of the cabinsite as determined by the DOR, multiplied by the rolling geographic location average lease rate effective for that year, plus an annual adjustment equal to the previous year's lease fee multiplied by the annual percentage change in the consumer price index (CPI) as provided in ARM 36.25.1001(9).

(4) Any lease that is put out for bid will be bid at a minimum bid of 2% of the entire, most recent appraised value without phase-in.

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA  
IMP: 77-1-235, 77-1-236, MCA

NEW RULE IV (36.25.1019) SUBLEASING AND ABANDONMENT OF IMPROVEMENTS (1) This rule applies to all cabinsites.

(1) through (3) remain as proposed but are renumbered (2) through (4).

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA  
IMP: 77-1-235, 77-1-236, MCA

NEW RULE V (36.25.1020) SALE OF CABINSITE LANDS

(1) This rule applies to all cabinsites.

(1) through (5) remain as proposed but are renumbered (2) through (6).

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA  
IMP: 77-1-235, 77-1-236, MCA

NEW RULE VI (36.25.1021) APPLICABILITY OF CABINSITE RULES

(1) Cabinsite ARM 36.25.1001 through 36.25.1013 shall apply to all cabinsites, however cabinsite leases issued under ARM 36.25.1016 shall be not be subject to ARM 36.25.1003, 36.25.1009(8), and 36.25.1012.

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA  
IMP: 77-1-235, 77-1-236, MCA

3. The amendments to New Rules I (36.25.1016) through VI (36.25.1021) are reasonably necessary for the following reasons.

New Rule I (36.25.1016) Reasonable Necessity: Chapter 401 of the 2011 Montana Session Laws (codified in part as 77-1-235 and 77-1-236, MCA) requires the state Board of Land Commissioners to adopt rules to implement the provisions of this act. Section 77-1-235(3), MCA, directs that:

"[b]y January 1, 2012, the board shall adopt rules to ensure that:

- (a) the open competitive bidding process authorized pursuant to this section is orderly and consistent with the board's constitutional fiduciary duties and that the number of leased cabin or home sites or city or town lots made available for competitive bid at any given time is consistent with the board's constitutional fiduciary duty of attaining full rental market value; and
- (b) the information used to determine the rental market percentage pursuant to this section is posted on the department's website and periodically updated."

Section 77-1-236(3), MCA, also directs that:

- (3) By January 1, 2012, the board shall adopt rules for the orderly transition for cabinsite lessees or licensees who have chosen the lease option pursuant to subsection (1) that is consistent with the board's constitutional fiduciary duty of attaining full rental market value."

New Rule I is reasonably necessary to effectuate the competitive bidding procedures directed by Chapter 401 of the 2011 Montana Session Laws, and is reasonably necessary to effectuate the purposes of that legislative act. The competitive bidding procedures were written to be as consistent as possible with existing cabinsite leasing rules and contract provisions, yet were written to allow for a transition to a different rental payment, as provided in Chapter 401 of the 2011 Montana Session Laws. The amendment to New Rule I recognizes that ARM 36.25.1005 provides the method for valuation of improvements.

New Rule II (36.25.1017) Reasonable Necessity: This rule implements the requirements found in Section two of Chapter 401 of the 2011 Montana Session Laws (codified at 77-1-236, MCA), which requires that current lessees be offered a

process for determining their state cabinsite lease rental rates according to rental market percentages in distinct geographic locations. Rule II is reasonably necessary to effectuate the purposes of Section two of Chapter 401 of the 2011 Montana Session Laws. The department chose to limit a "geographic location" under New Rule II to lands with water or without water under the jurisdiction of each unit office of the department in the western half of the state and in area offices of the eastern half of the state. The use of unit offices and area offices to determine the "rolling geographic location average" was utilized to provide administrative convenience and to provide sufficient numbers of leases to quickly implement the concept of the "rolling geographic location average." The amendment to the proposed rule substitutes the term "geographic location" for "neighborhood".

New Rule III (36.25.1018) Reasonable Necessity: This rule implements the transition requirements found in Sections two and four of Chapter 401 of the 2011 Montana Session Laws (codified at 77-1-236, MCA), which require that current lessees be offered a process for determining their state cabinsite lease rental rates according to rental market percentages in certain geographic locations. New Rule III is reasonably necessary to effectuate the purposes of Section two of Chapter 401 of the 2011 Montana Session Laws. Under the transition to competitive bidding, there may be some delay in placing all the leases up for competitive bidding. The amendment to New Rule III allows all lessees choosing to submit their leases to competitive bidding to utilize the rolling geographic location average, or 3% of the appraised value if no geographic location average has been established, until their lease is competitively bid.

New Rule IV (36.25.1019) Reasonable Necessity: This rule implements the assignment requirements found in Section three of Chapter 401 of the 2011 Montana Session Laws (codified at 77-1-236, MCA), which requires that current licensees and lessees be authorized to assign or rent their improvements. New Rule IV (36.25.1019) is reasonably necessary to effectuate the purposes of Section three of Chapter 401 of the 2011 Montana Session Laws. The department chose to require the removal or sale of personal property left upon the cabinsite lease premises after the end of the cabinsite lease because the abandonment or desertion of personal property interferes with the prompt assignment of a lease and the stream of lease revenue to the trust beneficiary.

New Rule V (36.25.1020) Reasonable Necessity: This rule implements the requirements found in Section four of Chapter 401 of the 2011 Montana Session Laws (codified at 77-1-318, MCA), which requires that current lessees be offered the opportunity, in the last year of their state cabinsite lease, to nominate the lands described in the lease premises for sale. Rule V (36.25.1020) is reasonably necessary to effectuate the purposes of Section four of Chapter 401 of the 2011 Montana Session Laws.

New Rule VI (36.25.1021) Reasonable Necessity: This rule implements the requirements found in Section one of Chapter 401 of the 2011 Montana Session Laws to allow a cabinsite lessee to elect to place its lease up for competitive bid or to retain the terms of its current lease, and the method described therein for determining the lease rental rate. Because some lessees will choose to place their leases up for competitive bid, while others will choose to retain their current lease terms and rental rate method, New Rule VI is reasonably necessary to effectuate the

purposes of Section four of Chapter 401 of the 2011 Montana Session Laws to describe what rules are not applicable to cabinsite leases competitively bid under New Rule I (36.25.1016).

4. The department has amended ARM 36.25.1011 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

36.25.1011 RENEWAL OF CABINSITE LEASE AND PREFERENCE RIGHT

(1) and (2) remain as proposed.

(3) A cabinsite lease that is not subject to competitive bidding is not subject to bids upon renewal if the current lease is in good standing, and the new lease will continue to meet the terms and conditions described in ARM 36.25.1001 through 36.25.1013, including the rental provided in 36.25.1003.

AUTH: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA

IMP: 77-1-235, 77-1-236, MCA

5. The amendments to ARM 36.25.1011 are reasonably necessary to effectuate the purposes of Section three of Chapter 401 of the 2011 Montana Session Laws (codified at 77-1-208, MCA), which provides that a "current lessee may complete or renew the licensee's or lessee's current lease based on valuation methods provided in subsection (1)(a)...". The department is proposing to modify its proposed repeal of ARM 36.25.1011(2), which would have struck the requirement that all leases to be renewed without competitive bidding. Leases utilizing a bidding method to establish their value do not have a preference right in bidding. By contrast, those leases utilizing the valuation method under ARM 36.25.1003 retain a preference right. The language that was removed from ARM 36.25.1011(2) in the proposal notice has been integrated back into the rule as part of (3) and recognizes the distinctions between the two types of lease valuation. There is no preference right for competitively bid leases because a preference right would be inconsistent with competitive bidding and the concept of a rolling average of bids in a geographic location. Under this amendment, leases that are not competitively bid will continue to exercise a preference right to renew the lease without competitive bidding. Also, due to a typographical error in the original proposal notice, the reasonable necessity the department cited Section four of Chapter 401 instead of Section three (77-1-318 instead of 77-1-208, MCA). However, the correct authorizing statute of 77-1-208, MCA, was correctly cited in the authorization section of the original proposal notice.

6. A summary of the written comments and oral testimony from the two hearings held on December 6 and 7, 2011, appears below with the department's responses.

COMMENT 1:

The DNRC's rolling, three-year neighborhood average replaces the one-time geographic location average stipulated in the transition section of the law.

RESPONSE 1:

SB 409 does not specify that use of the geographic location average is limited to a transitional period only. An average of all winning bids in a geographic location is a reasonable method by which to set a market rate percentage for cabinsites within a geographic location for the transitional period and beyond. DNRC disagrees that a single bid accurately establishes a market rate percentage for a given lot in all instances. The occurrence of weak market response or a bidder who has over-estimated a cabinsite's rental price must be taken into account when valuing a market rate percentage. Individual cabinsites will not go out for bid more than once every 15 years on average. To overcome bidding anomalies the market rate percentage must include multiple bids. The rolling average also recognizes that the market rate percentage can change over time with changes in demand and land value among other things.

COMMENT 2:

Fees would not be based on the actual value of an individual or like property, but on large property groupings that include many dissimilar lots.

RESPONSE 2:

The lease fee charged to each lessee on the bidding method will be based on the appraised value for the lessee's lot multiplied by the applicable average rate percentage for each geographic location. Section 77-1-236(1)(b)(ii) states that the most recent appraised value be utilized when setting a rental rate. In order to interpret this valuation process in a constitutional manner, which requires the state to obtain the full market value of the cabinsite, the rules clarify that a rolling geographic location average and use of subsequent appraisals will be utilized to set rental values for competitively bid leases.

The use of geographic locations described in the rules is appropriate and the cabinsites within the geographic locations described by the rules are similar. The most critical difference between cabinsites in a geographic location, the criterion which has the greatest influence on the rental rate percentage, is whether a given site is physically adjacent to water. The rules reflect this. The presence of water frontage, as well as other amenities such as availability of certain utilities, proximity to an urban area, et cetera, are also accounted for in the appraised value of each individual lot as provided by the Department of Revenue (DOR). See also Response 1.

COMMENT 3:

Commenter stated that the rules not comply with SB 409 in two critical ways: 1) a proxy will be used rather than the actual market rental value of individual lots; and 2) the annual adjustment will not be CPI.

RESPONSE 3:

DNRC asserts that the rules comply with the directions of SB 409. DNRC considers the average rate percentage for each geographic location to be an appropriate measure of a market-based rate. As required by 77-1-208, MCA, DNRC must use

property value established by the DOR. Fees would be based on the actual appraised values. Rental market value is not currently provided by the DOR.

From one year to the next the lease fee will be adjusted by CPI.

COMMENT 4:

This approach will lead to wild fluctuation in fees from year to year and eliminate predictability for both lessees and beneficiaries. A change of half of one percent in the average will result in a fee increase of \$1500 on a property appraised at \$300,000. A decrease in the average will result in decreased revenues for schools.

RESPONSE 4:

The average lease rate percentage for each geographic location may fluctuate, up or down, from one year to the next due to variation in bidding results. That will indeed result in fluctuation in the lease fees and, in turn, revenues from one year to the next.

COMMENT 5:

Commenter stated that the annual fee increases would not be based on the amount someone bids but on an administratively set percentage of appraised value, which is not unlike the old system SB 409 was designed to correct.

RESPONSE 5:

The average lease rate percentage for each geographic location is not administratively set. The market will determine the winning amount for each cabinsite put out for bid. The results will in turn determine the average lease rate percentage. The concept of the average rate percentage for each geographic location is specified in Section 2 of SB 409 but the specific details on how the average rate percentage would be determined, and what a geographic location might be, were lacking. Therefore, it was necessary for DNRC to craft an implementable process. See also Response 1 and Response 29.

COMMENT 6:

Commented stated DNRC has eliminated the transition process and the only way into the system is for lessees to cancel their lease and go directly to bid. Only a small percentage (about four percent) will be allowed into the system each year. The cap is ten percent but renewals make up about six percent annually.

RESPONSE 6:

DNRC has not eliminated the transition process. SB 409 does not specify the length of time for the transition to the bidding method. DNRC has determined that, in order for the Land Board and department to meet their fiduciary responsibility to ensure full return from these cabinsites, the number of leased cabinsites made available each year in a given geographic location should be limited to ten percent, or three (whichever is higher), of those actively leased cabinsites. The board's fiduciary responsibility is enumerated in Article X of the Montana Constitution and in Title 77, Chapter 1, Part 2 of the Montana Code Annotated (MCA). SB 409, Section 1(3)(a)



clarifies that the board shall adopt rules implementing SB 409 that are "...consistent with the board's constitutional fiduciary duties and that the number of leased cabin or home sites or city or town lots made available for competitive bid at any given time is consistent with the board's constitutional fiduciary duty of attaining full rental market value...". DNRC and the board have determined that a ten percent per year limit is necessary to meet this fiduciary responsibility.

The ten percent limitation regulates the number of competitive bids annually and thereby limits the volatility that would be expected if a large percentage of lots were allowed to go out for bid in a given year. The idea of a regulated process such as the ten percent limitation provides stability and consistency to the bidding process and the resultant bids.

The final form of the rules allow all interested lessees to switch to the bidding method and geographic location average lease rate effective in 2013. Competitive bidding of leases would still be limited to ten percent per year during the transition period. See Response 50.

According to an analysis of potential lease payments under the bidding system (as described in the environmental review of the rulemaking process) DNRC believes approximately 75% of lessees will benefit by the bidding method to an extent great enough that they would consider switching to the new method. With a ten percent limit on the number of active leases available for bidding in a given year, all leases under the bidding method will go to bid within the six- to eight-year period beginning in 2012. This is the maximum expected transition period; in reality it could be of less duration.

The ten percent limit would not include vacant cabinsites or renewals. Ten percent of leased cabinsites would go to competitive bidding each year in addition to any vacant cabinsites already available for competitive bidding.

The nature of the bidding method warrants limiting the number of cabinsites on the market at a given time. Unlike a private homeowner unsatisfied with the offers received for his house, DNRC has limited discretion to withdraw a cabinsite once it is made available for bidding. The highest acceptable bid (equal to or above the minimum bid amount) will most likely be awarded the lease, even if the successful bid is below what the board may believe it to be worth.

Current market conditions also suggest limiting the number of cabinsites made available at one time. In Flathead County, where approximately 25% of the state's cabinsites are located, there are currently over 19 months of housing inventory on the market (Kelly Appraisal, Kalispell). In Missoula County, where 32% of cabinsites are located, there are approximately ten months of housing inventory (Missoula Organization of Realtors). This existing inventory can compete with cabinsites for potential buyers/lessees. The reverse is also true, that the inventory of cabinsites available will compete with residential sales for buyers. The concepts of supply and demand suggest that fewer bids will be received per lot as the number of cabinsites

available at one time increases. Fewer bids per lot will generally mean lower successful bid amounts. DNRC argues that these conditions would not result in leases rate percentages that are a true reflection of the highest price that the market would accept for a cabinsite. In light of these market conditions, DNRC believes a six- to eight-year transition timeframe is appropriate.

COMMENT 7:

Commenter stated that SB 409 establishes a transition process for existing lessees using a one-time location average applied to the appraised value. This transition was intended to prevent the market from being flooded while allowing all interested lessees to convert to the new system.

RESPONSE 7:

While the scenario described in this comment would indeed prevent the market from being flooded with bids, it does not meet the intent of 77-1-235(3)(a), MCA, which directs the board to adopt rules to ensure that, "...the open competitive bidding process authorized pursuant to this section is orderly and consistent with the board's constitutional fiduciary duties and that the number of leased cabin or home sites or city or town lots made available for competitive bid at any given time is consistent with the board's constitutional fiduciary duty of attaining full rental market value". Lessees who are not converting continue with their existing lease.

The scenario described by the commenter eliminates those cabinsites that do not participate in competitive bidding from being used to establish a market lease rate percentage for each geographic location. The department does not agree with this interpretation of SB 409, which relies solely on vacant cabinsites to establish a rate percentage. It is reasonable to assume that increased bidding results will ensure the market lease rate percentage will more accurately reflect a market rate for these cabinsites. See also Response 6.

COMMENT 8:

Commenters stated that DOR's appraisal values are incorrect since DOR is forced to value the properties as if the lessee owns it.

RESPONSE 8:

This comment is outside the scope of this rulemaking. However, to clarify DNRC's view on the issue: the state of Montana holds cabinsite state trust land in fee simple (absolute ownership) for the benefit of the state trust land beneficiaries. Unlike a typical private property owner that holds the property in fee, The Enabling Act, the Montana Constitution, and current state law require that the state as a trustee receive full market value for fee simple property interests/rights. It logically and legally follows that full market valuation of fee simple property would reflect the value of all the fee simple property interests/rights, including the value of leasing or renting the property.

COMMENT 9:

The rules will artificially suppress the new system in two critical ways: 1) lessees will be discouraged from converting as they would need to cancel their lease and put their improvements at risk; and 2) lessees will be shut out of the bid process due to a random drawing of interested parties each year - with such a low cap they may wait years or never be selected. Restricting access to the new system does not comply with SB 409.

RESPONSE 9:

DNRC agrees some lessees may choose not to switch to the bidding method due to the possible risk the lease may be lost to another bidder. All lessees that wish to switch to the bidding method will have the opportunity to do so. Those lessees that do switch to the bidding method will still be required to go to bid. See Response 50, Response 6, and Response 7.

COMMENT 10:

A rolling three-year average is not the same as a one-time final rental market percentage and is also out of compliance with SB 409.

RESPONSE 10:

DNRC disagrees with this interpretation of SB 409. SB 409 does not state that the average lease rate percentage for each geographic location is established during the transition period and remains static indefinitely. DNRC disagrees that an average lease rate percentage established in 2012 will reflect the market for an indefinite period. This is not a practical assumption and would most certainly mean rents over time would move away from a market-based amount. See also Response 1. See Response 6 for a discussion of the board's fiduciary responsibility.

COMMENT 11:

Commenter stated that SB 409 specifies and repeatedly uses the terminology "open competitive bidding process". Bill sponsors envisioned an ebay-style auction that would allow all bidders to gauge the market and bid in accordance with rules governing full fair market value.

The definition of "fair market value" is codified in ARM 36.25.102, which reads: "Fair market value: the most probable price in terms of money that a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and the seller each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus".

RESPONSE 11:

The term "open bidding" is not defined in SB 409. DNRC believes the term "open" as utilized in SB 409 refers to a transaction process in which all eligible bidders are allowed to participate, with no preference right to the lessee. The inverse of such a process is the one that exists currently when a lease is renewed and the current lessee is allowed to exercise a preference right to retain the lease without any competition.

A sealed bid auction process is an established method for ensuring full competition and a fair return price. It requires bidders to submit their best bid. It is the process utilized to issue leases for most uses of trust land, including commercial, agriculture, grazing, and timber leases.

DNRC has explored for some time the options for electronic, web-based or "ebay" style bidding of residential leases. DNRC included language in its previous rulemaking to allow a bidding process, which is outlined in 36.25.1009(5). Such a bidding system is not precluded by the administrative rules implementing SB 409. DNRC could institute an "ebay" style system to handle the greatly increased number of competitively bid cabinsites expected under the bidding method.

As a point of clarification, ARM 36.25.102 defines "full market value" not "fair market value".

COMMENT 12:

Commenter stated a process is needed for determining the lease fee without the risk of losing the lease.

RESPONSE 12:

A competitive bidding method for determining lease fees, as envisioned in SB 409, will necessarily require an existing lessee to incur some risk. SB 409 specifies that there will be no preference right afforded an existing lessee whose lease is made available for bidding. Only if there is no competition for the lease can risk be eliminated. A no-risk option is provided by selecting the lease terms and conditions in ARM 36.25.1001 through 36.25.1013 (referred to colloquially as "Alternative 3B").

COMMENT 13:

Commenter stated the bid pool will be extremely limited which will not lead to an accurate bid process. The bid process needs to be open to all without limitation to get a true read on the market. Controlling how many leases are up for bid will lead to false readings and potentially higher bids due to lack of available leases which is very deceptive. If the market needs to be flooded with available leases, then it should be flooded.

RESPONSE 13:

If the board were to allow all interested lessees to have their leases made available for competitive bidding at one time it would not provide an accurate measure of the highest percentage of appraised value that the market rate would be willing to pay. The result instead would be a measure of the highest percentage of appraised value that the market rate would be willing to pay *in light of* an excess of properties available. The basic premise of the "supply and demand" model for price determination in a market is that the price for a particular good will vary the quantity of the good demanded and the quantity of the good supplied. If supply increases and demand remains unchanged, the price will decrease. This situation would not result in "the largest measure" of advantage to the state as is required of the board in Title 77 of the Montana Code Annotated.

COMMENT 14:

Sealed bidding will result in an undue stimulus for existing lessees forced to bid unreasonable amounts—beyond what a prudent, knowledgeable person would bid—in order to protect their improvements. Thus, this approach does not meet Montana's fair market value rule and does not comply with SB 409 open competitive bidding provisions.

RESPONSE 14:

No lessee is forced to switch to the bidding method and no one is required to make a bid, including the current lessee. If a lessee chooses to make the switch to the bidding method and thus be required to put the cabinsite out for competitive bidding at some point, DNRC expects the lessee to be aware of the risks associated with switching to the bidding method. DNRC expects the lessee and any other participating bidders to understand the limits of their personal finances, their willingness to pay, and to bid accordingly. If the current lessee is not the successful bidder, he or she will be compensated for the market value of the improvements on the cabinsite.

COMMENT 15:

SB 409 specifies that lessees voluntarily entering the bid process forfeit their preference right to meet the high bid and, thus, their automatic renewal. The law does not specify any change in that right for those not entering the bid process.

The DNRC is proposing to repeal the existing language in ARM 36.25.1011(2) which allows leases to be renewed without competitive bidding. Repealing this language will impact all lessees, regardless of the fee method inherent in their lease.

RESPONSE 15:

The intention of the rulemaking was not to repeal the preference right of lessees that wish to renew under the existing process (Alternative 3B). The repeal of ARM 36.25.1011(2) is intended to implement the provision of SB 409 which specifies that there is no preference right for lessees switching to the bidding method.

DNRC agrees that the proposed rules did not expressly retain the right of renewal for lessees that remain with the valuation process described in ARM 36.25.1001 through 36.25.1013. DNRC has added ARM 36.25.1011(3) to specify that a lessee's right of renewal is retained when the lease retains the valuation process described in ARM 36.25.1001 through 36.25.1013 including the rental provided therein.

COMMENT 16:

Commenter asked why DNRC was given authority to draft these rules since it opposed the law. Commenter said it appears that DNRC has attempted to rewrite the law through the rulemaking process to make it even less favorable, if not punitive to leaseholders. Commenter asked for a neutral third party or mediator to draft rules that have the potential to not be punitive to the leaseholders.

RESPONSE 16:

SB 409 directed the State Board of Land Commissioners to adopt rules. DNRC, as the administrative arm of the Land Board, is responsible for administrative rulemaking pertaining to trust lands.

COMMENT 17:

An outside appraiser should appraise improvements on each lease property prior to bid to determine value of these improvements and this amount should be published during bid process. This prevents need for mediation later and a more true bid process if bidders know exactly what they are "buying".

RESPONSE 17:

DNRC's intent is that the asking price for all cabinsite improvements be set according to ARM 36.25.1005(4). The proposed rules did not clearly specify that ARM 36.25.1005(4) applies to cabinsites that are made available for competitive bidding through the bidding method. The department has added New Rule I(4) (36.25.1016(4)) and New Rule VI(1) (36.25.1021(1)) to specify that the improvements valuation process in ARM 36.25.1005(4) shall apply to the leases under the bidding method.

COMMENT 18:

Commenter stated that if the rules are enacted, they will lead to significant additional vacancies among current lessees expecting relief from the new law, which will substantially lower revenues for Montana schools.

RESPONSE 18:

The effective lease rate percentage for the cabinsite program as a whole, and thus average lease fees, is expected to decrease following implementation and full transition to the bidding method. This will result in lower revenues for the trust beneficiaries as compared to the current program (Alternative 3B). It is not reasonable to expect vacancies will increase, however, as a result of lower average lease fees. See also Response 4.

COMMENT 19:

DNRC neighborhoods are based on DNRC's 16 offices and whether or not the property has water access. This will result in 32 neighborhoods (e.g. Rogers Lake is in the same neighborhood as Flathead Lake.) The DNRC neighborhoods will include vastly different properties with varying amenities.

RESPONSE 19:

Lease fees will vary between cabinsites at Rogers and the other lakes in the Flathead valley (using the example in the comment) as a result of differences in the appraised value assigned to each by DOR that reflect differences in amenities. Differences between lots on each lake are accommodated in the DOR value for each cabinsite.

When considering a lease rate percentage, cabinsites on Rogers Lake and on other lakes in the area are similar. The presence of water frontage is the single greatest variable accounting for differences in appraised values among cabinsites in a given geographic location. In consideration of the impact water has on the desirability of a cabinsite, DNRC has proposed creating two average lease rate percentages per geographic location: one for cabinsites with water frontage, and one for cabinsites without water frontage. See also Response 3.

COMMENT 20:

Commenter asked why lessees were not allowed to be directly involved in the writing of the rules.

RESPONSE 20:

This rulemaking process complies with DNRC procedural rules, ARM 36.2.101. As provided by ARM 2.5.104, the department director has the discretion to allow direct involvement of interested parties, through a negotiated rulemaking process. Negotiated rulemaking typically requires a lengthy time to conduct. Because SB 409 required implementing rules to be adopted by January 1, 2012, the director instructed DNRC to use the present rulemaking process.

COMMENT 21:

Fees would be based on the same neighborhood average regardless of the actual location of the lot. Thus, it does not comply with SB 409's intent to create a system based on the market for each individual property and, when that is not feasible, on comparable properties.

RESPONSE 21:

The Land Board, through DNRC, has been directed to adopt rules consistent with SB 409. Section 2(1)(b) of Senate Bill 409 states:

"(i) At least three winning bids made pursuant to [section 1] must be referenced against the most recent appraised value of the cabinsite property by the department of revenue in order to establish a rental market percentage. All rental market percentages that have been determined pursuant to [section 1] must be grouped together by geographic location and averaged together to determine a **final rental market percentage for each geographic location**. If there are not three winning bids in any one geographic location, then three bids from similar locations may be averaged to establish a rental market percentage.

(ii) The final rental market percentage determined for each geographic location pursuant to this subsection (1)(b) must be applied to the **department of revenue's most recent appraised value for each cabinsite property** in that location that did not go through the open competitive bidding process **to determine the initial lease amount** for each cabinsite property." [emphasis added]

Section 2(2) states: "The lease amount for the first year must be set as provided in subsection (1). The annual lease rental fee for each subsequent year must be

adjusted using the **average annual consumer price index** as published by the U.S. bureau of labor statistics.

The neighborhood average is a market-based rate, calculated from the results of three or more bids in the region from the previous three years." [emphasis added]

DNRC believes the method described in the rules for calculating rent in the first and subsequent years is consistent with SB 409.

COMMENT 22:

Commenter said DNRC should postpone forwarding the rules to the Land Board until it sits down to negotiations with these leaseholders and comes up with viable rules that will help make this process move forward, with all sides being able to point to its successes.

RESPONSE 22:

DNRC does not intend to delay adoption of the rules or to enter into a negotiated rulemaking process. DNRC believes the rules are viable as written.

COMMENT 23:

Nowhere in SB 409 is the term "neighborhood Average" used. CPI is the only term used. All references to "neighborhood Average" must be deleted from the rules.

RESPONSE 23:

The proposed administrative rules used the term "neighborhood average" in place of the phrase "final rental market percentage determined for each geographic location" as used in Section 2(1)(b)(i) and (ii) of SB 409. These two terms are interchangeable in this context. The term "geographic location" is used in SB 409 while the term "neighborhood" is not utilized. To be consistent with SB 409, references to "neighborhood" in the rules have been changed to "geographic location" where applicable.

COMMENT 24:

Commenter stated the purpose of rulemaking is to implement the statute as written, not to create new provisions in the rules that do not have basis in statute, which is the case with some of the proposed formulas and adjustments to the leases in these proposed rules. Commenter said DNRC was not granted the legal authority to rewrite the provisions of SB 409; it was given the authority to adopt rules to implement the statute as written. In this particular process DNRC has failed that most fundamental test and attempted to create adjustments to lease rates without any statutory basis.

RESPONSE 24:

The rules provide clarification to those components of SB 409 that were not adequately described. The rules fill gaps in the statute in a manner consistent with the board and DNRC's constitutional fiduciary responsibilities. See also Response 6 and Response 7.



COMMENT 25:

Commenter asked why DNRC waited until December 6 and 7 to hold public hearings, with the public comment period ending the next day (December 8). Past public hearings held on this subject had a lot of public discussion and debate that went on for weeks after these meetings. Commenter said something about the timing of these public hearings and the end date for public comment "just does not smell right". Commenter requested time to digest what is learned at these meetings in order to respond to the DNRC Rules Committee. Commenter asked to extend the comment period for an additional two weeks.

RESPONSE 25:

The Montana Administrative Procedures Act and DNRC rule requires DNRC to schedule public hearings no sooner than 20 days from the publication of the notice of proposed action (2-4-302(4), MCA, and ARM 1.3.307(4)(c)(ii)). The notice in the Administrative Register for the proposed rules was published November 10, 2011. The hearings could not be scheduled sooner than November 30, 2011 and still comply with the ARM previously mentioned.

DNRC's intent in scheduling the hearings toward the end of the public comment period was also to give the public as much notice as possible before the hearings to 1) make arrangements to attend the scheduled hearings; and 2) to review the draft rules and environmental review in advance and be prepared to ask questions at the hearings. If the hearings had been scheduled near the beginning of the comment period, fewer people would have likely been able to attend and those who did would be less prepared to participate. The timing of the hearings does not preclude the public from reviewing the rules and commenting prior to the hearings.

COMMENT 26:

While competitive bidding seems like a good thing, the process set forth by the proposed rules does not afford the public opportunity to enter that process until 2025. Even then, there is no preferential treatment to existing leaseholders.

RESPONSE 26:

DNRC's proposed rules provide an opportunity for all lessees to switch to the bidding method upon submitting an application and signing a supplemental lease agreement SLA. Lessees that sign the SLA will be required to go to competitive bidding at or before their lease renews. See Response 50.

SB 409, Section 1(2), specifies that lessees that go to competitive bid will not have a preference right to meet the high bid. SB 409: "A lessee choosing to voluntarily place a cabinsite lease up for competitive bid *is not entitled to a preference right to meet the high bid*" [emphasis added].

COMMENT 27:

Commenter stated that New Rule III (ARM 36.25.1018) gives the lessee the option of going to the competitive bid or to choose to renew the lease with the standard rental rate as provided by ARM 36.25.1001 to 36.25.1013. However these rules

force every leaseholder into Alternative 3B, an option, that does not have any statutory underpinning. Rule III should be amended to clarify that leaseholders also have the option of continuing to renew their leases at the standard five percent lease rate if they are on that particular option at the time of lease renewal. Rule III should be amended to provide leaseholders the option to renew their leases at the existing five percent lease rate if that is the option that the leaseholder is on at the time of renewal.

RESPONSE 27:

The proposal notice for the Alternative 3B rules (MAR Notice 36-22-143) cites the statutory rulemaking authority DNRC has to make rules on each proposed amendment or adoption. Additionally, the Land Board has the statutory authority for management of school trust lands and directed DNRC to initiate the Alternative 3B rulemaking process. New Rule III(2) has been amended to allow leaseholders choosing to do so to maintain a rental rate at five percent of appraised value under ARM 36.25.1003.

COMMENT 28:

Under New Rule III (ARM 36.25.1018) DNRC plans to allow the bid rate for the first year only then raise the lease rate to DOR's appraisal value, multiplied by the neighborhood average, plus an annual adjustment (premium times the CPI increase). Commenter stated that unfairly raised lease rates.

RESPONSE 28:

DNRC asserts that the administrative rules are consistent with SB 409. See also Response 21.

COMMENT 29:

Commenter stated the DNRC mechanism to avoid flooding the market is apparent. However, this leads to a very long lead time for many leaseholders to opt into the open-bid process. In light of the fact that abandoned leases are listed for public consideration, and each lease is unique, and spread across a great part of the state, flooding the market is irrelevant. Commenter proposed a more liberal threshold for lessees to opt into the open bid process.

RESPONSE 29:

See Response 50.

COMMENT 30:

The rate of vacancies since 2009 must be taken into consideration. True to market principles, if the lease rates are perceived to be too high, DNRC will be faced with increasing vacancy, which erodes the benefit to state lands.

RESPONSE 30:

DNRC is well aware of the market performance of its cabinsites. In setting any lease rate the department is seeking to establish a "revenue maximizing" price that provides the constitutionally mandated maximum returns to the trust beneficiaries.

While allowing unrestricted bidding might result in zero or negligible vacancies, the department does not believe this will attain the maximum revenue possible.

COMMENT 31:

Commenter stated neither the board nor DNRC should set the lease fees. It should be the actual open bidding process that determines the fees, which is what SB 409 intended.

RESPONSE 31:

DNRC has written the rules to reflect the bidding method directed by SB 409. The bidding method implemented by the rules uses the results of competitive bidding to set average lease rate percentages for each geographic location that, when multiplied by the most recent appraised value for each cabinsite, determines the lease fee for each lease.

COMMENT 32:

Commenter stated a fee structure should be based on the amount bid for each individual lot.

RESPONSE 32:

This is counter to the language found at Section 2 of SB 409. See Response 21.

COMMENT 33:

SB 409 does not support using a "rolling neighborhood average" as a lease escalator. To remove the appearance of a double-increase in the lease rates, the preferred system would establish a firm initial rate, with a sensible escalator, based on CPI. This option seems not to be inherent in any of the proposed rules.

RESPONSE 33:

Annual adjustments will be based on CPI. The lease fee may also change from one year to the next as a result of adjustment (either up or down) in the average lease rate percentage for each geographic location. DNRC believes the average lease rate percentage will fluctuate around a value that may reasonably be assumed to provide a measure of the percentage of DOR appraised value that the market is willing to pay for a cabinsite lease. Again, the actual fee for each cabinsite will vary according to the appraised value of the lot. See also Response 3 and Response 4.

COMMENT 34:

Commenter stated the cabinsite program should be terminated and all of the lots sold, like the state of Idaho.

RESPONSE 34:

The board will consider the sale of cabinsites when it is in the best interest of the applicable trust and only when full market value is secured to the state. New Rule V (36.25.1020) provides further guidance to the board and DNRC for the sale of cabinsites.

COMMENT 35:

Commenter stated that the transition process should be based on averaging comparable property bid amounts.

RESPONSE 35:

SB 409 specifies that bid results be used to establish an average lease rate percentage for each geographic location. It does not direct DNRC to average bid amounts. See Response 21.

COMMENT 36:

Bidders must agree to buy improvements before bidding.

RESPONSE 36:

A lease will not be issued to a bidder until the bidder has settled with the owner of the improvements for the value of the improvements and the ownership of the improvements is agreed to be transferred to the new lessee.

COMMENT 37:

SB 409 was supposed to provide stability. The lease fees should be stable and not change every year.

RESPONSE 37:

DNRC disagrees that the intent of SB 409 was to provide static lease fees. The key premise behind SB 409 was allowing the market to dynamically establish lease fees. See also Response 6 and Response 7.

COMMENT 38:

DNRC only uses a passive marketing campaign, not active. Commenter asked how the market sets prices if leases are not actively marketed.

RESPONSE 38:

DNRC began actively marketing its cabinsite program following adoption of the Alternative 3B rules in May 2010 (current rule set) then ceased active marketing in October of that year. Active marketing began again in May 2011 and ceased in October 2011. Marketing during these periods included classified ads in some of the major newspapers in the state, in a bimonthly statewide real estate publication, listing the available cabinsites on the DNRC web page, and placing an ad on Craigslist. The department is considering moving toward year-round active marketing of vacant cabinsites once the bidding method is initiated. The bidding method specifies active marketing of competitive bidding for currently leased cabinsites will occur April 1 to September 30.

COMMENT 39:

There should be a minimum bid on the improvements as well, instead of the improvements settlement coming afterward.

RESPONSE 39:

Settlement of the improvements price is between the improvements owner and the prospective buyer.

COMMENT 40:

The state is unfairly manipulating the market for leaseholder improvements by setting unrealistic annual fees. These escalating fees will inevitably lead to leaseholders being unable to sell their property and being forced to relinquish it to the state for no compensation.

RESPONSE 40:

For most lessees, the lease fee anticipated under the proposed rules is lower than that anticipated under the current (Alternative 3B) lease fee methodology under ARM 36.25.1003.

COMMENT 41:

The 1989 Legislature set the cabinsite lease rate at 3.5%. SB 424 in the 1993 Legislature authorized the Land Board to review the rate and the board maintained that rate. In 1999, MonTRUST sued the state over 14 laws that were believed to be unconstitutional. Cabinsite lease rates were part of that suit. The Montana Supreme Court found, in favor of MonTRUST, that the 3.5% lease rate "violates the trust's requirement that full market value be obtained". A negotiated rulemaking committee, authorized by the Land Board and facilitated by the DNRC, proposed a 5% lease rate that was approved by the Land Board and adopted in January of 2001. The 2011 Legislature then passed SB 409 requiring that a competitive bid process be used to establish the lease rate with the minimum bid to be set at 2%. This is one and one half percent lower than the rate that the Montana Supreme Court deemed to violate the Trust's full market value requirement. It is 3% lower than the rate established by the negotiated rulemaking committee in 1999. MonTRUST believes the starting minimum bid should be set at 5%.

RESPONSE 41:

DNRC has written the rules consistent with SB 409. A minimum bid is not a final lease rate. The legislatively directed procedure to start bidding at 2% does not restrain the constitutional discretion of the board to choose when to dispose of interests in school trust lands Article X, Section 4 of the Montana Constitution, and to obtain full market value for that interest as required by Article X, Section 11 of the Montana Constitution. Exactly what lease rates will be in each geographic location, as accepted by the department and the board, remains to be seen.

COMMENT 42:

MonTRUST agrees that competitive bidding is an appropriate way to attain full market value for cabinsite leases especially if the existing lessee has no preference right to meet the high bid. However this can only work if the bids are sealed bids. Otherwise the existing lessee only has to bid \$1.00 higher than the high bid. This would discourage other parties to enter the process as they could quite possibly only create the second highest bid. Commenter asked why go to the trouble of bidding in the first place.

RESPONSE 42:

DNRC will conduct bidding consistent with ARM 36.25.1009(5), which states, "All bids shall be submitted at a specific place and time as specified by the department. Bids may be sealed bids, oral auction, or submitted electronically, whichever is indicated by the department at the time it advertises for bids".

COMMENT 43:

Pertaining to the averaging of neighborhood lease rates using DNRC Units Offices as a neighborhood is not acceptable. As an example lumping values of leases for "Dog Town" with those of Morrell Flats could easily reduce the value of Morrell Flats.

RESPONSE 43:

Lease fees between lots at Dogtown and Morrell Flats will differ for two reasons: 1) Morrell Flats lots are considered to have water frontage, the Dogtown lots are not. A separate lease rate will be provided in each region for lots with water and lots without water; and 2) lots in these two areas have different appraised values. The difference in appraised value will result in a difference in lease fees. These conditions will result in differences in lease fees between most if not all areas with cabinsites. See also Response 2 and Response 19.

COMMENT 44:

Under New Rule IV(2) it appears that if a cabinsite is abandoned for a period of three years the improvements can be sold by the department. However Section (2)(a) indicates that any value received will be transferred to the previous lessee. The "REASONABLE NECESSITY" explanation indicates the department wants to lease the site as quickly as possible to continue the stream of revenue to the Trust. However MonTRUST believes that three years is way too long to wait before the department can dispose of the improvements or any other items of value left on the site. One year would be a better target.

RESPONSE 44:

The three-year provision is described in existing rule (ARM 36.25.1006) and also provided in Section 3 of SB 409. DNRC is not proposing an amendment to this rule.

COMMENT 45:

Pertaining to the sale of cabinsites under New Rule V the program should not be placed within the Land Banking Program. Cabinsites are a land type that should be treated in a similar way but separately. The sale of several high value cabinsites in any one year could prevent the favorable sale or purchase of other Trust lands under the limits of the Land Banking Program. If cabinsites sales are included then they should have a separate total limit.

RESPONSE 45:

DNRC believes the commenter is referring to 77-2-363(1)(a), MCA, which states, "The board may not *cumulatively sell or dispose of more than 250,000 acres of state land*. Seventy-five percent of the acreage cumulatively sold must be isolated parcels

that do not have a legal right of access by the public. At any one time during the life of the land banking process, the board may not sell more than 20,000 acres of state land unless the board has acted to use the revenue from that land to make purchases pursuant to 77-2-364." [emphasis added].

The cumulative acreage of all cabinsites, both leased and vacant, is less than 4800 acres. The department does not believe the restrictions imposed on the Land Banking program will unduly limit the department ability to sell cabinsites at the rate at which they will likely be nominated and made available for public auction.

COMMENT 46:

Currently, SB 409 seeks to lower lease rates to 2%, costing Montana Tech hundreds of thousands of dollars every year. Rather than allowing lessees to renege on lease agreements without penalty or compromising the Montana Constitution by allowing lessees to pay less than full market value for trust lands, choose to continue leasing trust lands at full market value. Commenter stated that doing so aids college students.

RESPONSE 46:

The Land Board, through DNRC, is obligated to adopt rules to implement the procedural provisions of SB 409 as directed by the Legislature; but in a manner which complies with the board's constitutional and fiduciary responsibility to secure the full market value for the disposition of interests in school trust lands. DNRC believes the rules meet these two important duties.

COMMENT 47:

Sheila Stearns, Commissioner of Higher Education, submitted the following comments:

"This letter sets forth the university system's comments to the rules proposed to implement Senate Bill 409. Our comments are as follows.

SUMMARY OF COMMENTS:

A. A change to market-driven rates must be fair and not be implemented solely to reduce rates at any cost. The university system does not object to a market-driven rate-setting process, so long as it is fair to both lessees and beneficiaries. The Senate Bill 409 legislation *directs* DNRC to set up a constitutionally sound process and DNRC should do that. Accordingly, DNRC should not limit the marketing period in the rules, should not award 15year leases at very low rates in bad economic times without a re-opener provision, and should not allow lessees to renege on lease agreements without penalty.

B. A minimum 2% lease rate is too low. By *all* objective accounts, a 2% lease rate is too low and will not maximize trust revenue for the trusts, as DNRC is required to do.

EXPLANATION OF COMMENTS:

A. The university system has no objection to the setting of rates on a market basis, so long as the process is fair and open and provides for a good opportunity for competing bids.

The university system is a proponent of the setting of cabinsite rates on a market-driven basis. Given the history of lessee-involvement in the cabinsite rate-setting process, which has been extensive, it appears, perhaps understandably, that trust land lessees only desire market-driven rates in times of bad markets. In times of good markets, they favor administratively set rates which are set lower than a strong market warrants. This manipulation of rate-setting, coupled with statutory provisions allowing lessees to renege on their current lease agreements to opt for artificially low prices, is not fair or constitutional and it defeats the requirements of state law, the Montana Constitution and the U.S. Congress' conditions on the use of our trust lands. The S.B. 409 legislation acknowledges the constitutional requirements in the provisions of the statute and the new law must be read in conjunction with other provisions of state law, including § 77-1-202, MCA, which requires the land board to "secure the largest measure of legitimate and reasonable advantage to the state" in the disposition of state lands. DNRC must make good on these directives in the law and propose constitutionally proper rules.

A market-driven system is fair to both parties only if DNRC can ensure the process attracts a reasonable number of bidders to the process. No prudent trustee would sell property in its custody at what amounts to a "fire sale," without a sufficient marketing period. No prudent trustee would place all of its beneficiaries' property on the market at the same time, thus inviting rockbottom bids. No prudent trustee would set the minimum bid lower than a fair price. No prudent trustee would lease for 2% of value property worth at least twice as much and then lock-in that low rate for a term of 15 years. Finally, no prudent trustee would unilaterally renegotiate a significantly lower contract price on a deal mutually agreed upon years before. Yet that is what Montana lessees appear to expect. If rates can be adjusted downward in a bad market, they should be adjusted upward in a good market. The state in particular, with special fiduciary obligations to the beneficiaries, must act as a prudent trustee. Senate Bill 409 and other state laws require that.

This legislation is one-sided in that it purports to benefit the lessees at the expense of the beneficiaries. Furthermore, it does not distinguish between those who are struggling to pay for their lease sites and those (the majority) for whom the lease sites represent second homes. Allowing lessees to revert to a 2% lease rate **and** awarding 15-year terms at that rate is unfair on two counts. At the very least the state should have the option to reopen these contracts when good economic times return. As John Duffield wrote in his 2011 study of Montana cabinsites, "A return to comparatively normal economic times may result in a future situation where a 5% lease rate is below the long-term revenue maximizing level" (Duffield, p. 19). Lessees will also reap the benefits of low lease rates in better times by reaping windfalls on their property transfers. Even in these bad times, lessees are making more on their improvements than values warrant, indicating that the underlying lease



cost is too low. (Duffield, p. 18). These findings are valid. Two percent rates do not, under any data we have seen, constitute fair market value.

We would support a fair and free market-driven rate-setting process. Senator Tutvedt testified on March 21, 2011, that, "We're talking about the market, allowing the market process to determine this value ... and [SB 409] allows DNRC to write the rules of how that will be determined." DNRC must be allowed to write rules which provide for a free and fair market-driven process.

The lease agreements currently in existence are legally-binding contracts entered into by consenting parties. People who would never expect to renege on a mortgage, a trust indenture, or a commercial contract, even if they had agreed to a variable interest rate, seem to think they can renege on these public contracts. The state is not allowed to renege on its lease agreements and neither should lessees be. Furthermore, the legislature is precluded from enacting legislation which impairs existing contracts and is also precluded from enacting protective legislation which allows trust land contractors to renege wholesale on their trust land commitments. This exact scenario, involving trust lands and a legislative act to bail out trust land contractors, has been held unconstitutional in the state of Washington and cited with favor by the Montana Supreme Court. *County of Skamania v. State*, 102 Wn. 2d 127, (Wash. 1984), cited in *MonTRUST v. Darkenwald*, 2005 MT 190.

B. The leasing of these trust land sites at 2% of appraised value for 15 years is illegal and inappropriate.

The Montana Supreme Court has already directed the Montana Legislature that a rate of 3.5% of currently appraised value is unconstitutionally low. *MonTRUST v. State of Montana*, 1999 MT 263. A review of recreational lots leased by state trusts, the federal government, corporations and utilities indicate that market lease rates are *generally above* 5%. (Duffield, p. 18). Duffield's analysis of cabinsite transfer data for the period 2003 through 2011 indicates that the full market rental rate is *above* the contract rental rate; from this, Duffield calculated the *implied full market lease rate from the transfer to be in the 5-7% range*. Duffield's 2011 review of the leases on parallel settings "argues against a minimum Montana lease rate below 4% of appraised land value." (Duffield, p. 14). Duffield concluded that, "SB 409, while likely reducing cabinsite vacancies, has the potential to *lower* both current trust revenues and the rate at which those revenues grow in the future." A 2% rate cannot be supported; DNRC should not enter into leases set so low and particularly should not enter into them for 15-year terms. Furthermore, Duffield found that "while there has been some drop off in the number of active leases, the total revenue has increased steadily." (Duffield, p. 7). DNRC still places the vacancy rate at below 10%, so dropping the lease rate to 2% to maintain full occupancy will *not* maximize trust land proceeds; it will decrease it.

## CONCLUSION

Further reductions of cabinsite rates will detrimentally affect trust land revenue and cause hardship to Montana families and students struggling to pay for college. A decrease in vacancies, if such occurs, will not rectify that. The 2011 Duffield Study's conclusion is: "...the current Montana target policy of assessing a minimum 5% annual lease rate on the full appraised value of the cabinsites is appropriate for the goal of maximizing trust returns from this resource." The university system has no objection to the implementation of a market-driven rate-setting process so long as the implemented process is characterized by the following components:

- Existing lease agreements are honored. No lessee should be allowed to renege on a lease agreement until it expires. The lessees have already been allowed to renege on their current leases in order to opt for a reduced rate under Alternative 3B. Lessees who abandon their leases must suffer consequences or this program will become entirely one-sided, binding the state and the beneficiaries but not the lessees.
- Market-driven rates are determined by a completely fair bidding process, in which the sites are placed on the market for a sufficient period of time, reasonable minimum rates are set, the market is not flooded, very low rates are coupled with shorter terms or re-opener provisions, and no existing lessee has any preference whatsoever.
- DNRC maintains lease rates which comply with *MonTRUST* and which approximate those set by similar governmental agencies, utilities and corporations, for these reasons: It's the law. The current rates are not forcing mass vacancies, and lowering the rates for everyone will not necessarily prevent the same rate of vacancies (under 10%) or increase trust revenue. A lease rate of 2% of appraised value is too low from all objective data".

RESPONSE 47:

DNRC opposed the passage of SB 409 during the 2011 Legislative session, including the provisions for the 2% minimum bid rate and the six month bidding duration. Now that SB 409 is law, the board, through DNRC, is obligated to adopt rules to implement the provisions of SB 409 that meet the board's fiduciary responsibility to secure full market value for the disposition of trust land. The department believes the rules meet, in the most balanced way possible, these two important and somewhat conflicting duties.

DNRC agrees that annual revenues are expected to be lower with implementation of the bidding method, in comparison to the Alternative 3B or previous lease fee calculation methods, including a lease fee set at 5% of the most recent DOR appraised value.

COMMENT 48:

Maggie Peterson, Vice Chancellor of Administration and finance, Montana Tech of the University of Montana submitted the following comments:

"I write on behalf of Montana Tech of The University of Montana, a beneficiary of the trust lands on which there are cabinsite leases, to provide our comments to the administrative rules proposed to implement Senate Bill 409.

Five Montana University System campuses are beneficiaries of trust lands on which there are cabinsite leases. Along with Montana State University, Montana Tech is one of the two largest campus beneficiaries of these leases. The proceeds of these trust land leases are critically important to university funding. These funds are pledged to bonded campus auxiliary building projects and also used for maintenance and services for student housing and other auxiliary facilities. To a large extent, Montana families, non-state funding sources, and trust land revenue pay for Montana's higher education auxiliary buildings and facilities. We rely on these funds as Congress and the Montana Constitution intended.

The proceeds of trust land cabin leases save students and their parents from paying even more in building fees and higher rates for campus housing and food services. At a time when tuition is increasing, college costs are higher, student college debt is increasing, and times are hard for families, it is difficult to understand why the state would drop lease rates to 2%. That is \$2,000 annually for use of a \$100,000 piece of property, about \$166 per month. Montana students pay approximately 3 times that to rent a tiny, double-occupancy dormitory room at Montana Tech. Montana Tech has determined that in order to cover the \$680,000 shortfall estimated in the S.B. 409 fiscal note, it would need to either increase student building fees by an estimated \$238 per year, or take funds away from the auxiliary deferred maintenance fund and redirect those funds towards the payment of bonds, or some combination of the two. We urge DNRC to adopt rules that reflect full market value, as required by the Montana Constitution, and the requirements of state law that require the land board to "secure the largest measure of legitimate and reasonable advantage to the state" and "provide for the long-term support of education".

RESPONSE 48:

See Response 46.

COMMENT 49:

Peter Scott, Shannon, Johnson and Waterman, PLLP, submitted the following comment:

"This firm is legal counsel for the Montana State Leaseholders Association (MSLA). Senate Bill (SB) 409 passed the Legislature in April, 2011. The bill creates an alternative method for setting cabin and home site lease rates for certain state owned trust lands. SB 409 became law in May, 2011, without Governor Schweitzer's signature. In his non-signing statement, the Governor said "I have informed members of the Land Board that they can expect to be back in court to relitigate *Montanan's for Responsible Use of the School Trust v. State of Montana (Montrust 1)*, 296 Mont. 402, 989 P.2d 800 (1999)."

Among other things SB 409 tasks the department of Natural Resources and Conservation (DNRC) with the preparation and adoption of implementing rules on or before January 1, 2012. On May 17, 2011, Bureau Chief J. Holmgren sent a memo to DNRC Trust Land Area Managers notifying them that the rule drafting process had commenced. In her memo, Ms. Holmgren proposed a rulemaking schedule based on the assumption that SB 409 would not be litigated. The schedule called for the Land Board to approve rulemaking on July 18, 2011. It also called for environmental review-conducted pursuant to the Montana Environmental Policy Act (MEPA)-to begin on July 19, 2011 and to be completed by Oct 15, 2011. SB 409 was not challenged in court. However, notice of Land Board approval for draft rules was not published in the register until October 27, 2011. The MEPA process did not begin until November 10, 2011. See Exhibits 1 and 2. DNRC has given lease holders and other interested persons until December 8, 2011 to provide comments on the rules and the Environmental Assessment (EA).

Separation of Powers. Both state and federal law preclude one branch of government from exercising the powers of another branch. The power to create legislation resides exclusively with Legislature. The Executive's power to implement legislation under delegated authority does not include the power to create new legislation. The intent of SB 409 according to its sponsor was to use open bidding to create a market based rental rate for cabin and home sites so that leaseholders will have a fair, predictable and straight forward process. Exhibit 3 (Tutvedt comment letter, 11-25-11). The MSLA believe SB 409 sets forth specific provisions that meet the Legislature's intent. However, the proposed rules not only fail to implement-but in key respects actually conflict with-the express language and legislative intent of SB 409.

The Governor's non-signing statement expresses concern about the a likely challenge to SB 409. DNRC staff have openly expressed the need to consider constitutional constraints on the adoption of administrative rules to implement SB 409. The constitutionality of legislative enactments is presumed at law. Only the judiciary may determine if a law is unconstitutional. It is MSLA's position the remedies available to an executive branch concerned about the constitutionality of a bill include the Executive's power to veto a bill or to direct his administration to file a judicial challenge. The executive does not wield the power to rewrite legislation by adopting administrative rules that fail to implement-and in fact conflict with legislative enactments. The rules proposed in this case run afoul of the constitutional requirement for separation of powers.

Private Property Rights. Numerous state and federal laws protect citizens' right to own property. MSLA members own property in the form of improvements on land leased from the state. The requirement for lease holders to construct and maintain the improvements they own is contractual. The state is a party to those contracts and stands to obtain title in the event a leaseholder is unable to convey the improvements. The adoption of regulations by DNRC, which is a market participant and contracting party, that eliminates property value and the uncompensated

conveyance of ownership to the state, constitutes an unlawful taking and other violations of the leaseholders' civil rights.

Annual Lease Fee Adjustment. Section 1 of SB 409 establishes a method for determining rental market value by offering vacant properties for open competitive bidding. Section 2 requires the Land Board (i.e., DNRC) to offer all existing cabinsite leaseholders the option of a 15-year lease contract based on the market valuation process set forth in Section 1 of the act. SB 409, Section 2, (l)(a). In both instances, lease fees for cabinsite properties are to be adjusted each subsequent year of the lease term using the "average annual consumer price index [(CPI)] as published by the U.S. bureau of labor statistics." SB 409, Section l(b)(iv); Section 2(2).

In New Rule III(2)(a), DNRC establishes an annual lease fee adjustment based on a rolling neighborhood average *and* the annual CPI. The addition of the rolling neighborhood average directly conflicts with the plain language of the act. Moreover it conflicts with the intent of the bill to create fairness and predictability. For a parcel with an appraised value of \$300,000, a change of one-half of a percent in the rolling neighborhood average would change the lease fee by \$1,500. This change can go up or down which introduces unpredictability for the lease holders and the trust beneficiaries. Thus not only does DNRC lack authority to add terms the legislature has omitted, the introduction of a rolling neighborhood average is at odds with the Legislature's intent to create a method that is fair and predictable. The public perception is that the resulting unpredictability is an intentional effort to chill interest in the use of this valuation method.

Transition Process. SB 409 allows existing leaseholders the option of transitioning into a lease with fees established under the open competitive bidding process for vacant parcels. Specifically, section 2(1) of the act unequivocally states, "the board *shall* offer all existing cabinsite lessees or licensees the option of a 15-year lease contracts based on the rental market valuation process provided in [section 1]." No such option exists in the rules proposed for adoption. By omission, the rules proposed by DNRC conflict with SB 409. In adopting administrative rules, DNRC lacks authority to omit what is included in the law. The rules must be amended to implement the transition option mandated by the Legislature.

Designation of Neighborhoods. SB 409 specifies that a one time location average will be applied to the existing leases that chose to exercise the transition option. The location average is to be based on conveyance of properties at "similar locations" [Section 2(1 )(b)(i)] or "comparable locations" using professional appraisal standards, Section 2(1)(c). Dividing the state by 16 established regions does not comply with the requirement to use professional appraisal standards. As the EA states most of the sites are concentrated in certain regions. Far more important are market variations within the regions that cabin and home sites are concentrated. The rules must be amended to recognize the significant market variation of properties.

Open Bidding. The law requires the board and DNRC (as its agent) to establish all "open" bidding process. As with the transition option, the proposed rules simply omit

this requirement in favor of a sealed bidding process. Not only does this omission conflict with clear legislative intent expressed in SB 409, it conflicts with existing definition of "fair market value," which is based on buyers and sellers acting prudently with knowledge. § 36.25.102, ARM. In a sealed bidding arrangement market participants are forced to guess on the value of a property. Use of sealed bids is particularly unfair to the holder of all existing lease that owns improvement and in the absence of qualified buyers may have a vested interest in continuing the lease in order to protect his or her investment.

Renewal for Leaseholders. Section 2(4)(a) and Section 3(2) of the act specifically reserves rights afforded to existing leaseholders under other methods of valuation. DNRC is proposing to repeal the automatic renewal provision in §36.25.1011(2), which would affect all leaseholders irrespective of their decision to participate in the competitive bidding process. This action is perceived as punitive and is also inconsistent with the plain language and clear intent of SB 409.

Reservation of Rights. By this reference, MSLA joins in and thereby reserves the right to initiate or participate in any judicial or contested case hearing based on issues identified in the public comments submitted in response to the proposed action or EA.

### Conclusion

The public perception is that DNRC and the Land Board, fearing legal action by the trust beneficiaries or others acting on their behalf, took special pains to propose rules acceptable to those beneficiaries. The public process lends weight to that perception. First there is no time for public review and comment on any substantive amendments to the rules, suggesting that the rules are to be adopted as they have been drafted. Second the determination of significance under MEPA was made by DNRC as an interested party. Not only is that determination questionable in light DNRC's role, it is questionable because of the nature and scale of the effected environment. The consequence is an incomplete analysis of the social and economic impacts to the human environment. The proposed rules do not implement the act that the Legislature passed and the Governor allowed to become law. For the reasons stated above and those submitted by others, DNRC should substantially revise the proposed rules in order to implement the law as it is written".

### RESPONSE 49:

In regard to the matter of separation powers and the rulemaking authority of the Land Board and department, see DNRC procedural rules, ARM 36.2.101.

In regard to the matter of private property rights, the department recognizes that cabinsite lessees own improvements. However, they do not possess a legal right to keep their improvements upon state trust lands without a lease. At the conclusion of a term of a lease, lessees have the right to remove their improvements, thus maintaining their ownership of their property.

In regards to the matter of annual lease fee adjustment, see Response 6, Response 7, and Response 10.

In regard to the matter of transition process, the proposed rules do not deny a 15-year lease to those lessees seeking to transition to the bidding method; rather, the rules clarify the manner of that transition only. See Response 1, Response 6, and Response 7.

In regard to the matter of designation of neighborhoods, the department asserts that the geographic locations and their proximity to water meaningfully account for valuation differences among cabinsites. See Response 2, Response 3, and Response 19.

In regard to the matter of open bidding, the department disagrees with the commenter's interpretation of ARM 36.25.102(11), described as "the most probable price in terms of money that a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and the seller each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus". DNRC believes the term "open" in the definition of "full market value" refers to the buyer's and seller's knowledge of the condition and quality of a product, and thereby each party's view of the value of the product. It does not refer to knowledge of another bidder's offer at a given time. Through a sealed bidding arrangement, prospective bidders are not "forced to guess on the value of a property" as the commenter suggests, but rather they must guess what other bidders are willing to pay and, accordingly, submit their best bid. This is the nature of a sealed bid auction.

In regard to the matter of renewal for leaseholders, see Response 15.

COMMENT 50:

Senator Bruce Tutvedt, SB 409 bill sponsor, submitted the following comments:

"My legislative intent on SB 409 was to direct DNRC to develop a market based rental rate for the State owned cabinsite properties; Let the market, through an open auction, set the rental market rates. A competitive bidding process is to be the method through which fair market value will be determined. There is to be no current lease holder preference. The bill purposely gives DNRC broad latitude in writing the rules so as to meet the legislature and land board's constitutional mandate to deliver full market value to the beneficiaries. It was also my intent to treat the leaseholders in a fair, predictable, straight forward manner. DNRC is to use as many of their current operating procedures as possible in developing these new rules.

Limiting the number of leaseholders per year that are eligible to enter the new market bid process to 10% is problematic. I would propose we let as many as desire enter the new system and get the neighborhood average as their new rental rate. They would be eligible for the new system upon stating their intention but only 10% would go to the market that first year. The remaining leaseholders would enter a

blind draw to stagger the when their lease would go through the bid process and begin their 15 year lease if they were the high bidder.

The number of neighborhoods appears to be too small or not split appropriately. In Flathead County the difference between large and small lake rental percentage rates could be extensive. I would request that we further split the neighborhoods. Possible new neighborhoods could be split by lakes that allow speed boats and lakes that do not, or lots over \$100,000 dollars and lots under \$100,000 dollars.

The need to use the new appraisal every 6 years could cause unwanted consequences either to the upside or the downside if we are using the 3 year rolling average percent rental rate. I propose that in the first year of the new appraisal the dollar amount paid by a lease holder not adjust by more than 10%. To use a new appraisal system value every 6 years and have a onetime 15 year lease with a CPI percent increase would cause real structural problems that would make the new lease system unworkable.

The value of the improvements must be valued correctly, or the States rental rates will be skewed. Both the owner and the prospective bidders should have a process to protest the improvement values.

At the time of a new renter, the new and old renter must be protected. The improvement owners must get paid, and the new renter needs to be protected and assured that the improvements are left in clean and operable condition. At the time of change of possession DNRC may need to have a staff person available to be on site."

RESPONSE 50:

DNRC agrees to eliminate the restriction on lessees switching to the bidding method. Instead of limiting the switch to only those lessees that go through competitive bidding, the department will allow an unlimited number of lessees to move to the geographic location average lease rate after applying and signing a supplemental lease agreement (SLA). During the transition period, 10% of those lessees that signed the SLA would be selected at random from the pool of lessees on the bidding method. Those lessees selected would go to competitive bidding in that year. Lessees would remain in the selection pool until they either go to competitive bidding or their leases comes up for renewal (in which case they would go to competitive bidding anyway). With this change to the administrative rules as they were originally proposed, the bidding method will be more consistent with the language of SB 409, while remaining consistent with the department's interpretation that all leases that switch to the bidding method before renewal during the transition period must go competitive bidding.

In regard to geographic location size and configuration, see Response 2, Response 3, Response 4, and Response 19.



In regard to the phase-in of new DOR appraised values, the department does not believe this is provided for in SB 409 or other statute.

In regard to the valuation of improvements, see Response 17.

In regard to the protestation of an improvements value, a bidder has limited rights to protest the asking price other than through direct negotiation with the seller. Following completion of the competitive bidding, the successful bidder who is awarded the lease, if other than the lessee, has available to him or her an arbitration process. The lessee likewise may utilize this arbitration process. ARM 36.25.125(5) and ARM 36.25.125(7) describe the arbitration process:

ARM 36.25.125(5): "*The value of the improvements will be **determined by arbitration** when the former lessee or licensee wishes to sell improvements and fixtures and the new lessee or licensee wishes to purchase such improvements and fixtures, but the parties cannot agree upon a reasonable value.*" [emphasis added]

ARM 36.25.125(7): "*In case of arbitration:*

*(a) the lessee or licensee, or purchaser and the former lessee or licensee, shall each appoint an arbitrator, with a third arbitrator appointed by the two arbitrators first appointed:*

*(i) no party may exert undue influence upon the arbitrators in an effort to affect the outcome of the arbitration decision; and*

*(ii) if any party refuses to appoint an arbitrator within 15 days of being requested to do so by the director, the director may appoint an arbitrator for that party;*

*(b) **the value of the improvements and fixtures shall be fixed by the arbitrators in writing and submitted to the department. That determination shall be binding on both parties; however, either party may appeal the decision to the department within ten days of the receipt of the arbitration decision by the department...***" [emphasis added].

The time for change of ownership may take weeks or months – it would be administratively impractical to have department personnel on-site during this entire period. The buyer and seller are responsible for making arrangements for the transfer of improvements ownership. DNRC has little role in ensuring both parties act in good faith with each other and are made whole except as provided in ARM 36.25.125.

The improvements are the property of the existing lessee and any warrant to condition, if desired by the buyer, shall be provided by the seller. The department makes no representations and will offer no warranties of any kind, either express or implied, concerning the improvements, including: 1) the condition of the improvements; 2) their title or ownership; and 3) their habitability, merchantability, or fitness for a particular purpose.

DNRC suggests that a buyer and seller use a closing agent, such as a title company, to handle the transaction. An agent will provide protection to both parties

by handling the funds transfer, check that taxes are paid, and facilitate the closing and filing of ownership documents.

COMMENT 51:

Senator David E. Wanzenreid submitted the following comments:

"The rules proposed by the department of Natural Resources (DNRC) to implement Senate Bill 409 appear to be based on the authority of the Land Board derived from the state constitution. As a result, the rules are substantially different from those that were anticipated at the time the legislation was debated and enacted.

In fact, one may argue that the rules propose very little change in the existing system. As a result, the policy framework enacted by the Legislature in response to objections raised by current leaseholders (both prior to and during the 2011 Legislature) is not fully implemented by the rules.

The most obvious conclusion one must make is that, under DNRC's scheme, the Legislature has no authority to structure a fair, market-based system. The comments submitted by the Montana Leaseholders Association not only identify fundamental questions about the adequacy of the proposed rules to implement the law; they also raise significant constitutional questions about the functions of the executive and the legislature in defining and implementing policies governing state-leased cabin and home sites.

These concerns are compounded by the abbreviated timetable for the adoption of the final rules by the Land Board. There is simply not enough time for the DNRC staff to adequately review and seriously consider the input received at the hearings conducted by the DNRC during the week of December 5 2011, as well as written comments made since the rules were noticed on 24 October 2011. The response of the DNRC is that the timetable fits the schedule the DNRC must maintain to meet contracts that come due in 2012.

Regardless, the process must be slowed down. Please find a way to do so.

The proposed rules do not appear to faithfully implement the requirements of Senate Bill 409.

If the effect of DNRC's recommendation to the Land Board is that the Legislature has no authority to modify the existing system or to create the structure for a market-based system, it should recommend that the existing system be maintained with no changes. This would likely result in litigation seeking to clarify the authority of the various branches, a development all of us would prefer to avoid.

If, on the other hand, the DNRC believes there is a joint responsibility between the branches in the formation of a market-based system, it should step back and assess whether the draft rules actually implement the clear policy objectives spelled out in the provisions of Senate Bill 409. In their current form, the rules do not.

If implemented, the proposed rules will result in (1) even higher vacancy rates of state-leased cabin and home sites and (2) a further erosion of revenue stream to fund our public schools.

The type of review described above will require more time. It will ensure a more deliberative process involving a more complete review of the clear intent and requirements of Senate Bill 409 and a more complete exchange of information and viewpoints on the part of leaseholders and those charged with administrative responsibilities for state leased properties. It will also protect our public schools from an additional losses of revenue".

RESPONSE 51:

DNRC has done its best to implement the directives of SB 409 in a constitutional manner. The rules were drafted with specific attention to SB 409, Section 1(3)(a) instructed the board to adopt rules implementing SB 409 that are "consistent with the board's constitutional fiduciary duties and that the number of leased cabin or home sites or city or town lots made available for competitive bid at any given time is consistent with the board's constitutional fiduciary duty of attaining full rental market value...".

While the Legislature has the ability to formulate statutory procedures for determining lease rates and fees, the Land Board retains the constitutional discretion to determine whether it is obtaining the full market value for any interest in school trust lands and whether to dispose of interests in school trust lands.

In regard to the comment timeline, see Response 22 and Response 25.

DNRC has asserted it would take significant vacancies to reduce the income stream from cabinsite leases. While vacant cabinsite leases will result in a loss of lease income, it is the department's belief that the bidding will result in geographic location rolling average lease rates at or just above 2%. This anticipated reduction in revenue is expected to be more than double the loss of income expected from future vacancies if SB 409 were not implemented. See also Response 18.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton  
MARY SEXTON  
Director

/s/ Tommy Butler  
Tommy Butler  
Rule Reviewer

Certified to the Secretary of State January 3, 2012.