

# DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



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### Frequently Asked Questions: School Trust Lands and Water Rights

#### **What are school trust lands?**

When Montana became a state in 1889, it was granted Sections 16 and 36 of every township to generate revenue for common schools and establish a permanent school fund. The State accepted these lands in trust for the people, directing that all proceeds go to the Montana school fund, which must remain inviolate.

#### **What has the Montana Supreme Court said about the trust?**

The Montana Supreme Court has ruled that the Land Board owes the duty of undivided loyalty to the beneficiaries of the school trust and must act with the utmost good faith towards the beneficiaries. The State has a binding and perpetual fiduciary obligation to secure the largest advantage to the State and provide for the long-term financial support of education. To this end, the Court has found interests in school trust lands cannot be alienated unless the trust receives adequate compensation for that interest. Any law or policy that infringes on the State's management over these lands is impermissible if it reduces the value of the land.

#### **What is the role of the Land Board and the Department of Natural Resources and Conservation?**

The Montana Constitution authorizes the Land Board to direct, control, and dispose of school trust land.

The Land Board is guided by the principle that school trust lands and funds are held in trust for the support of public education. It has a mandate to secure the largest advantage for the State and to fund education. It cannot transfer interests in school trust land unless the full market value has been paid or secured to the State.

In 1973 and 1996, the Land Board delegated its functions, except those expressly reserved by the Board, to the Department of Natural Resources and Conservation (DNRC). DNRC is subject to the same fiduciary duties as the Land Board.

#### **Why does the Land Board assert ownership in water rights developed by a lessee for beneficial use on school trust lands?**

The Montana Supreme Court has found allowing lessees to develop private rights on school trust lands would reduce the State's ability to fulfill its constitutional obligation to manage these lands to the maximum benefit for Montana's public schools.

A water right that is developed for beneficial use on school trust lands is an appurtenant water right. Water rights appurtenant to school trust land are part of the trust. As such, the Land Board must assert ownership over the water right and, if disposed of, receive fair market value for it to fully compensate the school trust beneficiaries.

Recently, the Montana Supreme Court upheld Land Board ownership of that portion of a pre-July 1, 1973, "use" water right developed and beneficially used on school trust land where the point of diversion for the water right is on private property.

**Are there exceptions to State ownership of water rights on school trust lands?**

Yes. For pre-1973 water rights, the State claims ownership only for those rights that were perfected and appurtenant to school trust lands after the lands vested with the State. Four things must exist for trust lands to vest with the State: an official survey of the land, plat approval, a federal grant of the land to the State, and the State's admission into the Union.

The State will not assert ownership in pre-1973 water rights perfected on, and appertaining to, private land, which have subsequently been used temporarily on school trust lands.

Additionally, in 2019 the Montana Legislature passed House Bill 286, which governs post-1973 water rights. HB 286 allows a lessee to temporarily use a private water right on school trust land for the duration of a lease. A lessee can obtain a temporary change authorization from DNRC to use a private water right on school trust land during the term of the lease. Though the term of the temporary change may not exceed 10 years, it may be renewed with DNRC's approval. Temporary use does not create an appurtenance to the school trust land, and the place of use automatically reverts to the private property upon which the water right was originally used.

**Does HB 286 prevent the State from asserting ownership in water rights diverted on private land and developed on school trust land?**

No. HB 286 was passed to address DNRC's unilateral assertion of ownership on numerous post-1973 water rights during the Bullock administration. HB 286 required the State to remove its name from those water rights to which it was unilaterally added. It did not require the State to waive any interest it has in those water rights, nor did it forbid the State from asserting an ownership interest in the future, so long as it followed the law in doing so.

Additionally, the Montana Supreme Court ruled HB 286 "maintains the status quo until the State asserts its ownership of water rights in the affected lands[.]" DNRC is analyzing all water rights from which it rescinded the State's name to determine whether the agency has a fiduciary obligation to assert a State interest through the processes established by HB 286.

**Did House Bill 286 require the State to remove its name from all water rights?**

No, it only requires the State be removed from those post-1973 claims to which it was unilaterally added.

**Does the State assert ownership over wells or pipelines used to divert a water right on private land to be developed and beneficially used on school trust land?**

No. Interests in water rights and wells/pipelines are separate and distinct. Just because an entity has a water right does not mean it has an interest in the ditch, canal, or other structure conveying the water.

**Does HB 286 apply to the adjudication of pre-1973 water rights before the Water Court?**

No. HB 286 applies to post-1973 water rights.

**Is the State's assertion of ownership a "taking" of private property?**

No, as mentioned, the State has an obligation to manage school trust lands to benefit Montana's public schools. As such, the State has a valid, legal interest in its property and all water appurtenant thereto. If properly vested in the State, asserting ownership in a right cannot be a "taking" or violate due process.