**IN THE SUPREME COURT OF THE STATE OF MONTANA**
No. DA 21-0314

ADVOCATES FOR SCHOOL TRUST LANDS,
Plaintiff and Appellant,
and

K.B. & K.B., by and through their parent and general guardian,
Plaintiffs,

v.

STATE OF MONTANA,
Defendant/Appellee,

and

MONTANA FARM BUREAU FEDERATION, MONTANA STOCKGROWERS ASSOCIATION, MONTANA WATER RESOURCES ASSOCIATION, ASSOCIATION OF GALLATIN AGRICULTURAL IRRIGATORS,
Intervenors and Appellees.

# Brief of Appellant ASTL

On Appeal from the Montana First Judicial District Court,
Hon. Michael F. McMahon, Presiding

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## Issues Presented

(1) Whether this Court's 1985 decision in *DSL v. Pettibone* directs that water rights, diverted on private land for beneficial use on trust lands, belong to the State.

(2) Whether the 2019 Legislature's House Bill 286 (ASTL Appx.#1) facially breaches the State's trust duties under the 1889 Enabling Act and Constitution by impairing the value of trust lands to trust beneficiaries.

(3) Whether the District Court erred in granting summary judgment to defendants concerning both facial and as applied constitutionality of HB286.

(4) Whether the District Court abused its discretion in refusing plaintiff's amended complaint.

## Statement of the Case

After disputatious proceedings in the 2019 legislature, House Bill 286 became law without the Governor's signature. (ASTL Appx.#1). Among other things, it commanded the Trust Lands Management Division of the Dept. of Natural Resources and Conservation ("TLMD") by September 30, 2019, to relinquish over a hundred water rights on which TLMD had filed administrative claims of trust ownership- mainly the Common Schools Trust.

On September 6, 2019, plaintiffs filed this lawsuit to declare HB286 invalid for violating the 1889 Enabling Act and the Constitution.[1] On September 12, the Attorney General stipulated to a preliminary injunction

[1]District Court Document #1 ("D.C.Doc.").

against implementation of HB 286.[2] Without objection, intervenors shortly joined the case.[3]

After some discovery, plaintiffs sought leave to amend their complaint.[4] While that was pending, the State moved for summary judgment,[5] and plaintiffs soon did the same.[6] On April 12, 2021, the District Court heard argument on all motions. The Court denied plaintiffs' motions, and granted the State's motion for summary judgment, dissolving the preliminary injunction, and entirely dismissing plaintiff's lawsuit.[7]

**Statement of Facts**

In 1985, the unanimous Montana Supreme Court contributed to a nationwide chorus of landmark court decisions which vigorously enforced the federal land grant trusts. Those trusts were created by Congress in each state's enabling act. Thus, in *Dept. of State Lands v. Pettibone* (*en banc,* 1985), on behalf of trust beneficiaries, this Court retroactively laid claim to water rights perfected on trust lands by the private lessees of those lands.

Previously, during the adjudication of water rights in the Powder River Basin, the Water Court held that title to twenty-three old water rights (pre-

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[2]D.C.Doc.6 &7.

[3]D.C.Doc.14-18.

[4]D.C.Doc.25-26, 10/26/2020.

[5]D.C.Doc.31-34, 11/04/2020.

[6]D.C.Doc.52-54, 12/23/2020.

[7]D.C.Doc.73-76, 4/14/2021 to 4/20/2021.

1973) developed for use on trust lands vested in the lessees, not the State.[8] Reversing, in *Pettibone,* this Court held that under Enabling Act trust duties, the State trustee *automatically* and *retroactively* obtained ownership of water rights developed on trust lands. The Court held, the unique character of the trust required those rights to be deemed appurtenant, and they may not be divested without full payment to the trust.

> ..the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property does so "subject to the trust" *Pettibone*, 702 P.2d, at 957.

When appropriating water for use on trust lands, a state lessee does so "on behalf of the State," and the State owns the water right.[9]

Both the Court[10] and the parties[11] in *Pettibone* recognized that the Court's decision would broadly impact past and future water rights developed on trust lands, not merely the 23 rights at issue. Since statehood, Montana's trust lands

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[8]ASTL Appx#11, Memo, Concl. of Law, Findings & Order, In the Matter of ...Powder River, Water Court #42J-D6473, 3/31/1983 ("Water Court Decision"); *Pettibone*, 702 P.2, at 950.

[9]702 P.2d, at 952; *see*, Justice Morrison, *concurring*, at 958.

[10]*Pettibone,* 702, P.2d at 950, "Because of the broad significance of this case, we also solicited amicus curiae participation."

Although none of the 23 water rights at issue predated Montana's 1864 Organic Act (which withdrew trust lands from the public domain), the Supreme Court sought supplemental briefing on the impact of trust claims upon pre-1864 water rights. *See DSLv.Pettibone*, Sp.Ct.#83-281, Amicus Curiae Brief (1st), Prof. Albert Stone, 6/29/1984, p.9.

[11]*DSLv.Pettibone*, Sp.Ct.#83-281, Amicus Curiae Montana StockGrowers Assoc. Brief ("*Amicus* Stockgrowers Brief"), 10/22/1984, states, at p.2,

> There is ..one issue which has such statewide application, the determination of which will affect ranchers and stockgrowers throughout this state. This issue is whether a state lessee, who developed and put water to beneficial use on land leased from the State, has a water right superior to the claim of the State...the decision made by this court will affect state lessees throughout the state.

have been mostly leased to private parties, and the rent and other income inures to trust beneficiaries. Presently, there are some 9,000 trust land leases for crop and rangeland on 4.76 million acres of trust lands.[12]

TLMD administers the trust lands using a combination of written leases and administrative rules, §§36.25.101 to 36.25.1021, ARM. One of the terms in every trust land lease, from at least 1973 to the present, says,

> LAWS AND RULES-The lessee agrees to comply with all applicable laws *and rules* in effect at the date of this lease, or which may, from time to time, be adopted.[13]

In turn, the incorporated administrative rules include a myriad of things like "reclassification" options (§36.25.109, ARM), lessee "improvements" (§36.25.125, ARM), and others.

One such rule, promulgated in 1987 to harmonize with *Pettibone*, amended an earlier rule to say in pertinent part,

> **§36.25.134, A.R.M, WATER RIGHTS**. (1) If a water right is or has been developed on state land by the lessee or licensee for use on the leased or licensed land, such water right shall belong to the state. ... Any water rights hereafter secured by the lessee and licensee on state lands shall be secured in the name of the state of Montana. (Emphasis added).

Ever since, consistent with *Pettibone*, §36.25.134, A.R.M. has required State ownership of both future and past water rights developed on trust land.

However, whether by accident or design, a number of trust lessees have not followed either *Pettibone* or §36.25.134, A.R.M. Many lessees drilled wells

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[12]D.C.Doc.1, Complaint, ¶12, *admitted*, D.C.Doc.10, State's Answer ¶12.

[13]*See, e.g.*, ASTL Appx.#7, 1973 lease form, p.19 ¶21, and 2019 lease form, p.21 ¶22. (emphasis added).

on their private land, applying the water to trust land, and registering the new rights in their personal names with the Water Rights Bureau ("WRB").

Therefore, in 2015, TLMD hydrologist, Dennis Meyer, began examination of every trust land parcel in the State and discovered some 1200 water rights with "places of use located on school trust lands, but without the ..State ..listed as an owner."[14] Many of those were post-1973 "exempt" groundwater rights under §85-2-306, M.C.A..[15] Following TLMD's understanding of *Pettibone*, Mr. Meyer then filed a Form 608 "Ownership Update" with WRB to recapture the State's ownership claims to 114 groundwater rights.[16] For 110 of those rights, the point of diversion was private land, but the first place of beneficial use was state trust land.[17] The other 4 rights were first used on private land, and later moved to trust land.[18]

Before filing the Form 608's, Mr. Meyer wrote each of the affected lessees, inviting feedback.[19] These acts by the trustee alarmed the Intervenor organizations which subsequently pressed, lobbied for, and secured enactment of HB286, 2019 (now, §85-2-441, M.C.A. *see*, ASTL Appx.#1).[20]

HB286 sought to reverse the Meyer water rights recaptures, and to

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[14]ASTL Appx#4, referencing spreadsheet HB286.xlsx (D.C.Doc.34, Exhibit D).

[15]ASTL Appx.#4; D.C.Doc.34, Exhibit D.

[16]ASTL Appx.#4 & #5, pp.1-3.

[17]D.C.Doc.34, Ex.D, pp.D-006 to D-016, *see*, column "State POU on Original Filing."

[18]*Id.*

[19]ASTL Appx.#5 & #6.

[20]ASTL Appx.#2, *passim*.

presumptively authorize exclusive lessee ownership of such water rights. It says, in pertinent part,

> **85-2-441. Temporary use of a water right on state trust land — restrictions on state ownership — rescinding of noncompliant ownership interests required.** (1) A water right owner may put water from a well or developed spring with ground water development works located on private land to beneficial use on state trust land for the duration of a state land lease the water right owner holds.
>
> (2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring located on private land exclusively based on trustee obligations for state trust land unless:
>
> (a) a court of competent jurisdiction determines that the state is an owner of that particular water right; or
>
> (b) the state is in possession of a deed transferring ownership of the water right to the state.
>
> (3) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired to satisfy trustee obligations for state trust land prior to May 11, 2019, in a water right or ground water development works that do not meet the requirements of subsection (2).

As HB286 made its way through the 2019 Legislature, state trust land managers, including DNRC Director Tubbs, vigorously opposed it.[21] They primarily argued that HB286 violated the constitutional principles in *Pettibone.* Director Tubbs testified that if HB286 was enacted, to assert the trusts' *Pettibone* rights, "We probably will run out of resources."[22] Those "resources" are funded directly by trust revenues that otherwise benefit the trust

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[21]ASTL Appx#2, *passim.*

[22]*Id,* p.17.

beneficiaries.[23]

In his Fiscal Note on HB286, the State Budget Director similarly opined that the bill would produce "$0" additional revenue, but its expenses were "UNKNOWN" (caps original).[24] The "Technical Notes" mirror TLMD's concerns, concluding,

> Applying HB286 as amended retroactively divests the State of these post-1973 water rights without compensation if the point of diversion is on private land. This violates constitutional trust principles.[25]

**Standards of Review**

The Supreme Court reviews the district court's rulings on the two summary judgment motions at issue *de novo* for correctness in conformance with M. R. Civ. P. 56.[26] It also reviews district court conclusions and applications of law *de novo* for correctness.[27] Interpretations and applications of constitutional and statutory law are similarly reviewed *de novo* for correctness.[28] In its analysis, the Court should draw all reasonable inferences from the evidence in the record in favor of the party opposing summary

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[23]§77-1-108, M.C.A., §77-1-109, M.C.A. (directing payment of State trust administration expenses from trust revenues).

[24]ASTL Appx.#3, p.1.

[25]ASTL Appx.#3, p.2, ¶5.

[26]*Clark Fork Coal. v. Mont. Dep't of Natural Res & Conservation*, 403 Mont. 225, 481 P.3d 198, 2021 MT 44 ¶32, (Mont. 2021); *Smith v. B.N.S.F. Railway*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639.

[27]*Smith, supra* , ¶11.

[28]*Bird v. Cascade County*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602 (*citing Moe v. Butte-Silver Bow County*, 2016 MT 103, ¶ 14, 383 Mont. 297, 371 P.3d 415).

judgment.[29]

The district court's denial of plaintiff's motion for leave to amend is reviewed for an abuse of discretion.[30]

**Summary of Argument**

1. The constitutionally based principles of *DSL v. Pettibone*, 702 P.2d 948, 216 Mont. 361 (Mont., 1985), apply equally to water rights developed by state trust lessees on private lands and beneficially used on trust lands.
2. HB286 grants rights, and imposes a presumption which categorically opposes *Pettibone*. Overcoming the presumption will burden the trusts, thus violating the 1889 Montana Enabling Act. *MonTRUST v. State* (1999), 989 P.2d 800; *Jerke v. Dept. of St.Lands*, 597 P.2d 49 (1979).
3. Summary judgment is inappropriate where material facts are disputed. Rule 56(c), M. R.Civ.Pro.
4. Leave to amend should be freely granted, especially where the facts are still in development through discovery. Rule 15, M. R.Civ.Pro.; *City of Missoula v. Mt. Water Co*, 2018 MT 139, 419 P.3d 685.

[29] *Bird, supra*, ¶9.

[30] *Seamster v. Musselshell Cnty. Sheriff's Office*, ¶6, 374 Mont. 358, 321 P.3d 829 (Mont. 2014).

## ARGUMENT

### I. *DSL v. Pettibone* requires that water rights, diverted on private land for beneficial use on trust lands, belong to the trust.

This Court's *en banc* deliberations in *Pettibone* were rigorous, spanning two years, with two separate days of oral arguments.[31] It repeatedly ordered supplemental briefing. The Court reviewed eleven briefs: eight from the parties, two from *amicus* law school professor Al Stone, and one from the Montana Stockgrowers Assoc.[32]

Nor was *Pettibone* a lone-wolf decision. It shared company with many state and federal decisions enforcing trust duties from state enabling acts enacted by Congress. Following, we summarize them.

### A. Duties of the State as trustee of the 1889 federal land grants.

In the Enabling Act of 1889 –creating statehood for Montana, Washington & the Dakotas– Congress granted thousands of tracts of federal land to Montana in trust for the support of schools, universities, and other institutions.[33] It is well-settled that these grants created real, enforceable

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[31]Register of Action, Mont. Sup.Ct. No.83-281, (1983-1985).

[32]*Id.*

[33]§§ 10-11, 25 Stat. 676 (1889).

trusts,[34] which impose duties based in the Enabling Act & Constitution.[35] The 1972 Montana Constitution at Article X commands,

> **Section 11. Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be *held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.*
>
> (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until *the full market value of the estate or interest disposed of*, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
>
> (3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States. (Article X, Sec. 11, emphasis added).

Section 11 imposes distinct duties on the State as trustee. Most relevant, from subsections 1 and 2, are:

> (1) To hold the lands "in trust for the ..purposes for which they have been ..granted,"
>
> (2) To obtain "..full market value of the estate or interest disposed of.."

The subsection 1 duty, to hold the lands "in trust," means applying the general law of trusts,[36] which, in turn, impose an additional set of intrinsic

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[34]*MonTRUST v. State* (1999), ¶13, ¶42, ¶51, 1999 Mont. 263, 296 Mont. 402, 989 P.2d 800; *US v 111.2 Acres of Land in Ferry County Washington* (E.D. Wash. 1968), 293 Fed. Supp. 1042, 1044-1045, *affd.*, 435 F.2d 561 (9th Cir 1970); *County of Skamania v. State* (Wash. 1984) (*en banc*), 685 P.2d 576, 580; *Kanaly v. Janklow* (South Dakota, 1985), 368 N.W.2d 819, 822-823..

[35]Omnibus Enabling Act, 25 Stat. 679, § 11 (1889), as amended, 47 Stat. 150 (1932), 81 Stat. 106 (1967); Art 10, Sec. 2, 3, 4, 11, Const. of Mont. (1972).

[36]*Authorities, supra* note 34; *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993); *Plateau Mining Co. v. Utah Division of*

(continued...)

trustee duties.[37] This case focuses primarily on three of them: Undivided Loyalty, Prudence and Accountability.

**Duty of Loyalty.** "A trustee is under a duty to act solely in the interest of the beneficiaries as to matters ..involving trust property. This duty... is the bedrock of the trust relationship; it is a duty of undivided loyalty."[38] This Court has declared,

> When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts which require a standard with a "punctilio of an honor the most sensitive." A trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person.[39]

**Duty of Prudence.** The duty of "prudence" supplies an objective standard of care for measuring the adequacy of trustee acts.[40] Courts look to see if the trustee acted as would a prudent person of requisite skill and judgment. In a leading Washington case, followed in *Pettibone*, the Court said,

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[36](...continued)
*State Lands*, 802 P.2d 720, 728-729 (Ut. 1990); *Hill v. Thompson*, 564 So.2d 1, 6 (Miss. 1989); *County of Skamania v. State*, 685 P.2d at 580; *Oklahoma Education Assn. v. Nigh*, 642 P.2d 230, 235-236 (Okl. 1982); *Alaska v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981); *State ex rel Ebke v. Bd. of Educational Lands & Funds*, 47 N.W.2d 520, 523 (Neb. 1951).

[37]Comment a., §379, Restatement, Second of Trusts.

[38]Rounds & Hayes, Loring— A Trustee's Handbook, 1996, §6.1.3, p. 112; See, §170, Restatement of Trusts; §72-34-103, MCA., "Duty of loyalty;" §72-34-105, MCA., "Duty to avoid conflict of interest;" Scott on Trusts, 4th Ed., 1987, §170, p. 311.

[39]*Montanans for the Responsible Use of the School Trust v. State*, 1999 MT 263, 989 P2d 800, ¶40, see *Skamania* (1984), 685 P.2d at 579-582.

[40]Restatement, Trusts III, §227; Restatement, Trusts 2d, §174; §72-34-114, M.C.A., "Duty to use ordinary skill and prudence;" Bogert, Hornbook of Trusts, 6th Ed. , §93, pp. 334-335.

> A trustee has a duty to manage trust assets prudently; .. a trustee breached its fiduciary duty by disposing of a trust asset without obtaining "*the best possible price..*"[41]

Obtaining the "best possible price" or value for trust assets is a consistent requirement.[42] And, favorable treatment given existing lessees or insiders is particularly suspect.[43]

**Duty of Accountability.** The duty of accountability condenses several obligations,[44] summarized by professor Scott,

> A trustee is under a duty to the beneficiaries of the trust to keep clear and accurate accounts.[45]

A trustee's failure to render a sufficient account of his conduct *shifts the burden of proof* to him in trust litigation.[46]

In short, a breach of the school trust, is a breach of the Enabling Act and

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[41] *Skamania* (1984), 685 P.2d at 582-83 [emphasis added].

[42] *Pettibone*, 702 P.2d at 954 ("..to allow lessees to develop private, personal rights on school lands would impermissibly reduce the DSL's ability to manage these lands for their highest value"); *Rippey v. Denver US Nat. Bank*, 273 F.Supp. 718, 739 (D.C.Colo, 1967) (trustee "must seek ..the best price obtainable"); *Webb & Knapp, Inc. v. Hanover Bank*, 133 A.2d 450, 456-459 (Md. 1957) (duty to fully investigate market); *Allard v. Pacific Nat'l Bank*; 663 P.2d 104, 111 (Wa.,1983).

[43] *In re Guardianship of Saylor* (2005), 328 Mont. 415, 121 P.3d 532, ¶24 (conservator to treat longstanding agreements carefully); *Cheyenne-Arapaho Tribes of Oklahoma v. U.S.*, 966 F.2d 583, 590-91 (10th Cir, 1992) (Duty to renegotiate trust land leases before extending existing pooling agreements); *Allard v. Pacific National Bank* (1983); 99 Wash.2d 394, 405, 663 P.2d 104 (voided sale in part because trustee sold to lessee under lessee's right-of-first-refusal).

[44] Restatement (Second) of Trusts: duty to keep and render clear and accurate accounts, §172; duty to furnish complete and accurate information to the beneficiaries, §173; to take reasonable steps to take and control trust property, §175; and to keep the trust property separate from individual or other's property, §179.

[45] Scott on Trusts, §172, p. 452.

[46] See, discussion and authorities, *infra*, page 21.

Constitution, and tough remedies apply.[47]

## B. *Pettibone* applies to all lessee-developed groundwater used on trust land.

Citing and following many of the foregoing precedents, in *Pettibone* (1985) this Court decreed that water rights beneficially used on trust lands vest in the trust. It summarized,

> We hold that title to these water rights vests in the State. The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.[48]

*Pettibone* clearly concluded, based on the Enabling Act and Constitution, that: When a lessee of trust land appropriates water for beneficial use on trust land, the water right is *appurtenant to trust land,* and *belongs to the State*.

The *Pettibone* Court primarily based its decision on two principles from the Enabling Act and Constitution,

> 1– "[A]n interest in school land cannot be alienated unless the trust receives adequate compensation for that interest." 702 P.2d, at 954.
>
> 2– "Any law or policy that infringes on the state's managerial prerogatives over the school [trust] lands cannot be tolerated if it reduces the value of the land." *Id.*

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[47] *See authorities, supra* notes 34 and 36.

[48] *DSL v. Pettibone*, 702 P.2d, at 952.

The Court explained principle #1 by distinguishing cases cited by the Water Court, Respondents, and the Stockgrowers, who had argued that "intent" of the appropriator was the *sole* basis for vesting a water right.[49] Instead, *Pettibone* focused on (a) the unique character of trust lands, saying they are subject to "a different set of rules,"[50] and (b) applied the rule that "an appropriative right becomes appurtenant to the land *for the benefit of which the water is applied*," *i.e.*, the place of use (aka, "POU").[51] It added, "..all of the water rights at issue are used either in whole or in part on the [trust] lands." *Id.*

The Court derived principle #2 in part from its previous holding in *Jerke v. Dept. of St.Lands*,[52] which had declared the "preference right" leasing statute unconstitutional as applied to grazing associations that sub-lease trust land to their members. It said,

> To allow the preference right to be exercised in this case would be to install the Grazing District as the trustee of the land. It, rather than the Department of State Lands, would decide who will occupy the land but it would not be bound by a constitutional or fiduciary duty.[53]

In neither *Jerke* nor *Pettibone* was there any actual *evidence* in the record of "reduced value to the land" from the challenged practice. By contrast, the

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[49]"Title to a water right vests in an appropriator without regard to ownership of land." *DSLv.Pettibone*, Sp.Ct.#83-281, Respondents Brief (1st), 11/14/1983, pp.3-4, 11.; Water Court Decision (ASTL Appx.#11), "Memo," pp.4-6; *DSLv.Pettibone*, Sp.Ct.#83-281, *Amicus* Stockgrowers Brief, pp.5,9.

[50]702 P.2d, at 955.

[51]702 P.2d, at 954, (emphasis added).

[52]182 Mont. 294, 597 P.2d 49 (1979); and *Rider v. Cooney,* 94 Mont. 295, 23 P.2d 261.

[53]702 P.2d, at 954, quoting *Jerke*.

District Court's decision in the instant case wholly turned on the supposed absence of "reduced value" evidence.[54]

In *Jerke* and *Pettibone*, the Supreme Court believed *ipso facto*, that the practices it was enjoining "reduced the value of the land." In *Jerke*, the high bid had been matched, so there was no dollar difference between prospective lessees. Nor did the Supreme Court rely on expert testimony about the "value" of the management regimes in dispute.

Likewise, in *Pettibone*, the Supreme Court and parties all assumed, without evidence, that trust lands *with water rights* are more valuable than trust lands *without* them.[55] Many other courts, including the U.S. Supreme Court, have reached similar factual conclusions– that harm to trust beneficiaries inevitably result from breaches of trust duties on trust lands.[56] Such judicial heuristics are fully supported by the law of evidence. Both Montana and Federal Evidence Rules 201 contemplate,

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[54]D.C.Order, p.8, ¶34; *see,* pp.18, 19, 20; "[plaintiffs] have offered no credible evidence that HB 286, on its face, reduces the value of trust land." *Id*, p.24.

[55]"..said rights are a valuable property right," *DSLv.Pettibone*, Sp.Ct.#83-281, Respondent Brief (1st), 11/14/1983, p.3; *DSLv.Pettibone*, Sp.Ct.#83-281, DSL Brief (1st), 7/8/1983, pp.4-5, 7. *Pettibone*, 702 P.2d, at 955-56 ("control" of water rights "means control of the land"); *See*, ASTL Appx#10 & 11 (no issues of "value" mentioned).

[56]*Lassen v. Arizona*, 385 U.S. 458 (1967)(struck down admin.rule allowing free rights of way over trust lands without proof of value); *Kadish v. Az.*, 747 P.2d 1183, 1189-1196 (Az. 1987)(invalidating flat rate for trust mineral leases);*Skamania,* 685 P.2d at 580-581 (invalidating legislative recision of timber sale contracts based; no findings of actual harm); *Oklahoma Education Assn. v. Nigh*, 642 P.2d at 235-236 (invalidating statutes without proof of financial loss); *Ervien v. US.*, 251 U.S. 41 (1919) (struck statute that allowed, but did not require expenditure of trust revenues to benefit third parties).

> Judicial notice of facts, [that are] not subject to reasonable dispute because it ..is generally known within the ..court's territorial jurisdiction; or ..accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Those cases all belie the main premise of the District Court's decision, below. Indisputable injury to trust beneficiaries should be treated as such.

Additionally, the *Pettibone* Court provided an "alternative ground" for its decision. Agreeing in substance with *Amicus* Prof. Stone who wrote, "[i]t does not make sense for each succeeding tenant to acquire and walk off with one water right after another,"[57] the Court said,

> ..vesting title in lessees would [allow] that lessee .. to control the use of the land. In many cases in this semi-arid area, the control of water means the control of the land itself. ...This situation is clearly repugnant to school trust principles.[58]

Those *Pettibone* principles apply equally to the 136 water rights which are impacted by HB286:[59] Those water rights were diverted by lessees of trust lands for use on trust lands. The only ways they are at all different from the 23 rights in *Pettibone* are:

A. Their place of diversion ("POD") comes wholly from groundwater sources on private land.

B. They are post-1973 rights.

C. Some rights may (or may not) have been created using procedures in §77-6-115, M.C.A., or §77-6-301,M.C.A.

None of these differences are material under *Pettibone's* Enabling Act and

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[57]Sp.Ct.#83-281, *Amicus* Curiae Brief (1st), Prof. Stone, 6/29/1984, p.4.

[58]702 P.2d, at 955-956.

[59]See, Meyer Declaration, D.C.Doc.34, Ex.D, showing on Tab 1, 110 water rights with State POU on original filing, and 26 such rights on Tab 3.

constitutional principles. Each is discussed, as follows.

(A) In *Pettibone*, the Supreme Court and parties all declared that there were no distinctions between groundwater and surface water rights.[60] And, despite some vague references to points of diversion ("POD") in the *Pettibone* briefs and opinion, it was the POU –or place of *beneficial use*– to which the Court applied its constitutional principles. Principle #1 was based on the *value* contributed to the land by the water rights, quoting, §70-15-105, M.C.A., "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land ***for its benefit***..." It continues, noting, "the water rights are ***used*** ..***on*** the school lands."[61] A mere POD, alone, on land contributes nothing to its value. Only the POU produces value.

Accordingly, in *Pettibone*, the courts and parties all concurred in *splitting* ownership of three water rights *based on* their POU: #4748, #4748-01 (diverted on the boundary between trust and private land, and used on both), and #9874 (entirely diverted on trust land, but split for application onto trust and private land). *Only the water applied to trust land was in dispute; the other portions were deemed to be private*.[62] In short, consistent with Montana cases,[63] no one

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[60]702 P.2d, at 957; *DSL v.* Pettibone, Sp.St.#83-281, Amicus Stockgrowers Brief, at 15.

[61]702 P.2d, at 954 (emphasis added).

[62]*DSLv.Pettibone*, Sp.Ct.#83-281, DSL Brief (1st), 7/8/1983, pp.1-2; *Pettibone*, 702 P.2d, at 950 ("One straddles the border between a state-owned and privately-owned section , and is used on both...One right is in a reservoir on state land that serves both the state section and an adjacent private section"); ASTL Appx.#10, Water Court, Pre-Hearing Order, 8/9/1982, pp.3-4, ¶2; *See*, ASTL Appx.#12, Water Court, Findings, 5/27/86, p.4, re 42J-W-004748 and 4748-01, pp.5-6, re 42J-W-009874.

[63]*See cases*, discussed at *DSLv.Pettibone*, Sp.Ct.#83-281, *Amicus Curiae* Brief (continued...)

regarded ownership of the place of diversion as legally consequential to ownership of the water.

(B) No language in *Pettibone*, and certainly none of its constitutional principles, apply solely to pre-1973 water rights. Nor is there anything in the Water Use Act or HB286, suggesting such a distinction.

(C) The District Court, below, at length indicated ASTL's complaint was unripe because some of the 136 water rights may have been acquired under §77-6-115, M.C.A., or §77-6-301,M.C.A. (and we don't know whether, or which ones). Arguably, using those statutes, the TLMD might have granted permission to lessees to claim trust water rights for themselves. But, *Pettibone* addresses this issue, saying, as a matter of constitutional law,

> The State has no power, absent adequate consideration, to grant the lessees the permission to develop non-appurtenant water rights, and every school trust lease carries with it this limitation.[64]

Further, the *Pettibone* Court pointedly notes that ***if*** such statutes were to be interpreted as allowing that, they would likely be unconstitutional.[65]

There being no basis for any legal distinction, the 136 water rights affected by HB286 are subject to the same rules as those in *Pettibone*.

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[63](...continued)
(1st), Prof. Albert Stone, 6/29/1984, pp.1-3.

[64]702 P.2d, at 957.

[65]702 P.2d, at 956.

## II. The District Court erred by not granting ASTL summary judgment that HB286 facially breaches the State's trust duties.

HB286 does not *irrevocably* give away the trusts' water rights. But, it violates the Enabling Act and Constitution because it creates a *presumption* about ownership of water rights that diametrically rejects both *Pettibone,* and pre-existing contractual lease terms.

HB286 *retroactively* decrees that (1) lessees "may put water..to beneficial use on state trust land," with or without the consent of TLMD, and (2) that water rights on trust land presumptively belong to the lessees, rather than to the trust.[66] For the trusts to overcome that presumption, one water right at a time, deprives them of considerable valuable resources. But, the District Court, below, could not see that.

First, the District Court erred in its application of the standard of review. It's opinion, at pp.11-13, cited standard-of-review language for constitutionality of statutes, quoted from *MonTRUST v. State* ("*MonTRUST I*") (that they are "..presumed to be constitutional," etc.),[67] and from *Pettibone* (that "..anyone who acquires interests in such property" does so "subject to the trust").[68] But it neglected to consider how the Supreme Court *actually* applies those standards in *real* cases. "'The Court's determination must do more than 'merely recite the *magic words*.'"[69]

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[66]Full text, *supra*, p.6, subsections (2) & (3).

[67]¶11,1999 Mont. 263, 989 P.2d 800.

[68]702P.2d, at 956-57 (citations omitted).

[69]*In re Case No. WC-0006-C-2018* (Montana Water Court, 2021), p.2.; *See*, (continued...)

Instead, the crux of the District Court's whole opinion was its rather astonishing conclusion, "there is no credible evidence that HB 286 will turn any current irrigated trust land into dry trust land."[70] But, to state the painfully obvious, if "valuable" water on trust land belongs to the lessee, the land will become "dry" whenever the lessee decides to take it away. A more abject rejection of this Court's principles in *Pettibone* is hard to imagine.

In so concluding, the District Court failed to adhere to the additional directions of this Court in *MonTRUST I,* which say,

> We follow our previously discussed standard of review [at ¶11]in determining whether the statutes are consistent with the constitutional mandates of the trust and the State's fiduciary duties as a trustee.[71]

Again, those "magic words" must be understood as they have actually been applied by the Court. *MonTRUST 1*, then, enforced trustee duties by facially invalidating statutes at ¶¶46-51, and ¶¶52-58, for breaches of common law trust duties that were authorized, but might not necessarily occur under the statute. At ¶¶55-58, the Supreme Court applied the trust duties of "loyalty" and "accountability" in declaring the procedures of §77-6-305, MCA, facially unconstitutional. Similarly, Judge McCarter's *MonTRUST 1* opinion (affirmed by the Supreme Court) also employed common law trust

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[69](...continued)
*McDermott v. Mont Dept. of Corrections*, ¶21, 2001 MT 134, 29 P.3d 992 (Mont. 2001) (emphasis added).

[70]D.C.Op., at 19, lines 1-3.

[71]*MonTRUST,*, ¶¶18-19, 989 P.2d, at 804 [citations omitted].

duties to the same ends.[72]

*Jerke*, supra, had also found a procedural provision of Montana Code unconstitutional as applied because of the burden it placed on the trustee to manage trust lands. The presumption created by HB286 is materially indistinguishable from the statutes in both *MonTRUST I* and *Jerke*.

By contrast, the District Court never once mentions the mandatory trustee duties of "loyalty," "prudence," or "accountability," which were pivotal principles of *MonTRUST I.*[73] Therefore, it also disregarded that subsections 2 and 3 of HB86 are explicitly *disloyal* to the trusts by imposing their punitive rules *only* on "state trust lands," but not on private land, private trusts, nor any other state lands. HB286 applies only to *constitutionally* based water rights claims, no others.[74]

Another error of the District Court was putting the burden of proving harm on the wrong party. When a *trustee* breaches trust duties, he bears the burden to show that beneficiaries are *unharmed*. Professor Bogert says,

> He is bound to keep clear accounts and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him.[75]

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[72]D.C.Doc. 53, McCarter dec. attached, pp.3-4, p.12 "productivity."

[73]*MonTRUST I*, ¶¶40-42, ¶¶52-58.

[74]*See*, authorities, *supra,* notes 38, 39.

[75]Bogert on Trusts and Trustees §962, pp 10-13 (2d Ed, 1962), Cases: *31st daySee*, *Kadish v. Az.*, 747 P.2d 1183, 1189-1196 (Az. 1987)(invalidating flat rate for School Trust mineral leases even though in some cases it produces full market value); *Skamania,* 685 P.2d at 580-581 (invalidating unilateral legislative recission of timber sale contracts based on divided loyalty without making findings of actual harm); *Oklahoma Education Assn. v. Nigh*, 642 P.2d at 235-236 (invalidating battery of statutes without proof of actual financial loss); *Ervien v. US.*, 251 U.S. 41 (1919) (struck (continued...)

The *Skamania* case, heavily relied on by *Pettibone*, illustrates how the burden of proof should be imposed on state trustees.[76] In the instant case, plaintiffs repeatedly sought discovery about the impacts of HB286 to the trusts. The Attorney General's responses reveal that the trustee has no answers.[77] The District Court failed even to mention that uncontradicted evidence.

Another critical point ignored by the District Court was that HB286 categorically rejects explicit provisions contained in all trust land leases since at least 1979.[78] All leases required, "[a]ny water rights hereafter secured by the lessee and licensee on state lands shall be secured in the name of the state of Montana."[79] But, HB286 requires TLMD to file a lawsuit, or procure a deed, every time it seeks to enforce that provision. HB286 *presumes* the *invalidity* of those lease terms, and does so without compensating the trusts, a direct violation of the Enabling Act and Constitution.[80]

Finally, the District Court ignored, without mention, uncontradicted evidence of harm from HB286. The process HB286 imposes on trust managers to recover water rights presumptively given away by the bill will be

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[75](...continued)
down statute that allowed, but did not require expenditure of trust revenues to benefit third parties).

[76]685 P.2d, at 581-583.

[77]ASTL Appx.#8 & #9, *passim*.

[78]*See*, ASTL Appx#3, HB286 Fiscal Note, p.2,¶5.

[79]§36.25.134, A.R.M, formerly, §26.3.123, ARM (Promulgated , M.A.R. 1979, No.3, pp. 79-80; Incorporated by reference in leases, *See, e.g.*, ASTL Appx.#7, p.19 ¶21, and p.21 ¶22.

[80]1889 Enabling Act, §11, Mont. Const. §11, sub.(2).

expensive. Those expenses are paid directly from trust revenues, thus harming beneficiaries. That evidence is described above, at pp. 6-7.

On the foregoing points, the facts are undisputed. The uncontradicted evidence to date brings this case within the ambit of *Pettibone*, *Jerke* and *MonTRUST I*. The District Court erred in not granting plaintiffs' motion for summary judgement.

## III. The District Court erred in granting the Attorney General's motion for summary judgment.

The District Court at length recited the standards under Rule 56(c), M.R.Civ.Pro., for grant or denial of summary judgment,

> Summary judgment is proper when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. ...The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. ...*Summary judgment should never be a substitute for trial when there is an issue of material fact.* Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim... Summary judgement is "an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment*. Summary judgment is not to be utilized to deny the parties an opportunity to try their cases.. *If there is any doubt as to the propriety of of a motion for summary judgment, it should be denied*. D.C.Order, pp. 13-14 (citations omitted, emphasis added).

The crux of the District Court's decision was that "[plaintiffs] have offered no credible evidence that HB 286, on its face, reduces the value of trust land."[81] That was the fulcrum of the decision, below.

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[81]D.C.Order, discussed, *supra* note 54.

But in granting summary judgment, the District Court disregards, (1) Appropriate constitutional review under *MonTRUST I* and *Jerke*,[82] (2) actual evidence of reduced value of trust assets,[83] (3) that the burden of proof regarding injury is on the trustee, and the State's evidence is nugatory,[84] and (4) that discovery in this case had not closed.[85] Each of those reasons demands denial of summary judgment, and the District Court erred in granting it.

## IV. The District Court abused its discretion in rejecting amendment of plaintiff's complaint.

ASTL's proposed amended complaint made these primary changes:

1. It amended plaintiffs' legal theory to include additional "as applied" challenges to HB 286 in light of discovery.[86]
2. It amended the legal theory to add "as applied" challenges to HB 286 and §85-2-306(1), M.C.A., in light of new arguments by the Attorney General.[87]
3. Plaintiffs sought attorney fees against Intervenors under general

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[82]See, discussion & authorities, pp.19-21.

[83]See, discussion, pp.6-7.

[84]See, discussion & authorities, pp.21-22; *compare*, ASTL Appx.#8 & #9.

[85]*City of Missoula v. Mt. Water Co*, 2018 MT 139, 419 P.3d 685 (dismissal reversed for further discovery in *as applied* challenge).

[86]D.C.Doc.25, 1stAmmd.Cplt., ¶¶30-32.

[87]*Id.*; D.C.Doc.25, 1stAmmd.Cplt.,¶¶33, 37.

trust law principles.[88]

Although the standard of review regarding amended pleadings nominally states, "[t]he decision to grant or deny a motion to amend lies within the discretion of the district court,"[89] this Court has often said,

> "Refusal to permit an amendment to a complaint which should be made in the furtherance of justice is an abuse of discretion." While Rule 15(a)(2) does not mean a district court automatically must grant a motion to amend, the Rule is "to be interpreted liberally so that allowance of amendments [is] the general rule and denial is the exception."[90]

The Supreme Court has described *very few* situations which justify *denial* of a Rule 15(a)(2) motion to amend.[91] None of them apply here, and none were relied on by the District Court in rejecting ASTL's amendment. In fact, the District Court quoted precedent, saying,

> "Generally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time and which would further justice; on the other hand, amendments which would result in undue delay or undue prejudice to the opposing party or amendments which would be futile need not be permitted."[92]
>
> On the issue of futility, "it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop *no set of facts under its proposed amendment that would entitle the pleader to*

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[88]D.C.Doc.25, 1stAmmd.Cplt., ¶¶29, 39-42.

[89]*Bitterroot Inter. Sys. v. West. Star Trucks,* ¶48, 153 P.3d 627, 638, 2007 MT 48 (Mont. 2007).

[90]*Ally Fin., Inc. v. Stevenson,* ¶13, 2018 MT 278, 393 Mont. 332, 336, 430 P.3d 522, 525 (Mont. 2018) (citations omitted).

[91]*Seamster v. Musselshell Cnty. Sheriff's Office*, ¶14, 321 P.3d 829, 832 (Mont. 2014) (unnecessary delay, bad faith, prejudice etc.); *See also, Lindey's, Inc. v. Professional Consultants, Inc.*, 797 P.2d 920, 923, 244 Mont. 238, 242 (Mont. 1990).

[92]*Reier Broad. Co. v. Mont. State Univ.-Bozeman*, 2005 MT 240, ¶8, 328 Mont. 471, 121 P.3d 549 (emphasis added).

*the relief sought*."[93]

The District Court's sole basis for rejecting plaintiff's amended complaint said,

> Plaintiffs' proposed amended complaint does not cure the *evidentiary record deficiencies*. They have alleged *no additional facts* to show that their as applied challenge to either HB 286 or Mont. Code Ann. § 85-2-306 are ripe. (DC Ord.,pp.26-27, D.C.Doc. ).

Instead of following this Court's rule –whether "no set of facts" could be developed entitling plaintiff "to the relief sought"– the District Court imposed a much heavier burden on ASTL. It demanded a current "evidentiary record" or "additional facts" in the amended complaint.

First, under this Court's rule, an amended complaint whose primary change adds "as applied" constitutional challenges to a statute invokes *fact* inquiries, which in turn, requires further development of facts.[94] "As applied" challenges focus on the constitutionality of legislation in particular circumstances.[95] In this case, of course, DNRC officials report there are at least 164 water rights to which that inquiry applies.

In this case, the supposedly "missing facts" according to the District Court, were evidence that HB286 reduced "the value" of trust lands.[96] For context, when these motions were decided, *no* depositions had been taken, *no*

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[93]DC Ord., p.5, *citing*, *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155-56 (1991) (emphasis added).

[94]*City of Missoula v. Mt. Water Co*, 2018 MT 139, 391 Mont. 422, 419 P.3d 685 (dismissal reversed for further discovery in *as applied* challenge).

[95]*Marriage of K.E.V.*, In re, 883 P.2d 1246, 1249, 267 Mont. 323, 328 (Mont. 1994); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[96]D.C.Order, discussed *supra* note 54.

close of discovery had been ordered, and the Attorney General's interrogatory responses *repeatedly* said, concerning impact to the *value* to trust lands,

> See generally the legislative history of House Bill 286 of the 2019 Montana Legislature. There may also be additional reasons the 2019 Montana Legislature passed House Bill 286. *This fact inquiry is not complete, and the State's response will be supplemented as needed*.[97]

The State's third discovery responses further disclose that, *to date*, no one on behalf of the State trustee has performed any computation, whatsoever, concerning the total water rights affected by HB286, nor their values.[98] Accordingly, ASTL's amended complaint multiple times alleged lost "value" to the trusts from HB286.[99]

Finally, as noted *supra*, the District Court completely ignored, without any mention, the evidence in the record from multiple state trust managers about the deleterious financial impact of HB286 to trust beneficiaries.

In short, it was arbitrary for the District Court to reject a motion to amend the complaint based on the "evidentiary record" of a case in which the facts were still in development. In these circumstances, it is logically impossible to find ASTL "can develop no set of facts" under which the beneficiaries could prevail. (Nor, we note, did the District Court even make such a finding).

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[97]State of Montana's Answers to Plaintiffs' First Consolidated Discovery Requests, ASTL Appx.#8, pp.4-7 (emphasis added).

[98]State of Montana's Answers to Plaintiffs' Third Consolidated Discovery Requests, ASTL Appx.#9, *passim*.

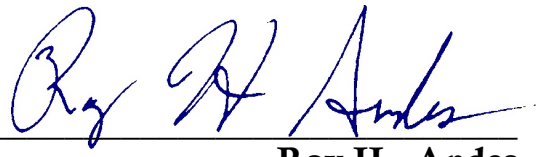
[99]D.C.Doc.25, 1st Ammd.Cplt ¶¶14, 15, 24, 25.

## CONCLUSION

ASTL respectfully requests:

1. That summary judgment for the State be reversed,
2. That summary judgment for ASTL be granted, that HB286 facially violates the Enabling Act and Constitution,
3. That ASTL's motion for leave to amend be granted,
4. That this case be remanded for proceedings consistent with the Court's decision.

RESPECTFULLY SUBMITTED this 31st day of August, 2021.

by 

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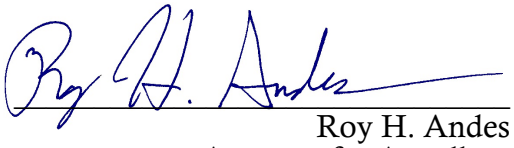
### Certificate of Compliance

I hereby certify that the foregoing document complies with M.R.App.Proc. 27 in that it is prepared in a 14 point proportional spaced typeface, double-spaced, with left, right, top and bottom margins of 1 inch, and contains 7,566 words, excluding the table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

Dated this 31st day of August, 2021.



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## Certificate of Service

I hereby certify that I delivered a true and correct copy of the foregoing instrument by eService via the Montana Courts E-filing service, on the date thereby designated, to each of the following persons:

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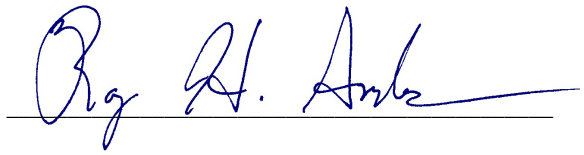

**Order Being Appealed: *Order on Pending Motions* (D.C.Doc. 73, "D.C.Order")**

**April 12, 2021**

(following page)

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

| | |
|---|---|
| ADVOCATES FOR SCHOOL TRUST LANDS; and K.B. and K.B. (minor children), by and through their parent and general guardian,<br><br>Plaintiffs,<br><br>v.<br><br>THE STATE OF MONTANA,<br><br>Defendant,<br><br>and<br><br>MONTANA FARM BUREAU FEDERATION, MONTANA STOCKGROWERS ASSOCIATION, MONTANA WATER RESOURCES ASSOCIATION, and ASSOCIATION OF GALLATIN AGRIGULTURAL IRRIGATORS,<br><br>Intervenors. | Cause No. BDV-2019-1272<br><br>**ORDER ON PENDING MOTIONS** |

Before the Court are the following motions:

1. Plaintiffs' October 26, 2020 Motion to Amend their Complaint for Declaratory Relief, Preliminary Injunction and Permanent Injunction and Attorney Fees (complaint);
2. Defendant's (Montana) October 30, 2020 Summary Judgment Motion; and
3. Plaintiffs' December 22, 2020 Partial Summary Judgment Motion.

The motions are fully briefed. At Montana's request, oral arguments were held on April 12, 2021. Having fully considered the parties' respective briefs, supporting affidavits, exhibits, arguments and the controlling relevant law, the Court concludes that Plaintiffs' Amendment Motion should be **DENIED**, Montana's summary judgment motion should be **GRANTED**, and Plaintiffs' partial summary judgment motion should be **DENIED.**

## BACKGROUND

In their September 6, 2019 complaint, Plaintiffs contend House Bill 286 (2019) now codified as Mont. Code Ann. § 85-2-441 (jointly referred to as HB 286), on its face[1] "violate(s) the 1889 Enabling Act, the 1972 Montana Constitution, and trust law." They also allege this 2019 statute on its face "expressly violates" *Dept. of State Lands v. Pettibone (In re Powder River Drainage Area)*, 216 Mont. 361, 371, 702 P.2d 948 (1985). Plaintiffs, in addition to awarding them their attorneys' fees, want this Court to declare Mont. Code Ann. § 85-2-441 "invalid, void, and unenforceable" and "to set [it] aside in perpetuity."

[1] A facial challenge is a claim that a statute "is unconstitutional on its face -- that is, that it always operates unconstitutionally." *Besaro Mobile Home Park, LLC v. City of Fremont*, 2006 U.S. Dist. LEXIS 94330, 6 (N.D. Cal., 2006) (citing authority).

HB 286 provides as follows:

> **Temporary use of a water right on state trust land — restrictions on state ownership — rescinding of noncompliant ownership interests required.**
>
> (1) A water right owner may put water from a well or developed spring with ground water development works located on private land to beneficial use on state trust land for the duration of a state land lease the water right owner holds.
>
> (2) The state may not obtain an ownership interest in a water right or the ground water development works of a water right that is diverted from a well or developed spring located on private land exclusively based on trustee obligations for state trust land unless:
>
> (a) a court of competent jurisdiction determines that the state is an owner of that particular water right; or
>
> (b) the state is in possession of a deed transferring ownership of the water right to the state.
>
> (3) Before September 30, 2019, the state shall rescind any claim of ownership it asserted or acquired to satisfy trustee obligations for state trust land prior to May 11, 2019, in a water right or ground water development works that do not meet the requirements of subsection (2).
>
> (4) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101.

Mont. Code Ann. § 85-2-441 (2019).

On September 16, 2019, based upon the Plaintiffs and Montana's stipulation, this Court issued a preliminary injunction that, among other things, enjoined HB 286's implementation.

On October 18, 2019, Montana filed its answer to Plaintiffs' complaint.

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On October 30, 2019, this Court granted Intervenors' unopposed Intervention Motion. On November 13, 2020, they filed their answer to Plaintiffs' complaint.

On December 16, 2019, this Court granted The Rural Montana Foundation's (RMF) motion to file an *amicus* brief.

**UNDISPUTED FACTS**

It appears to the Court that the following facts are undisputed for purposes of the dueling summary judgment motions:[2]

1. Montana, by and through the State Board of Land Commissioners (Board) administers, among other things, approximately five million school trust land acres (trust lands). In this regard, "[Montana] serves as a trustee of [trust lands] and the [Board] administers the trust. We also have acknowledged that the [Board] 'is bound, upon principles that are elementary, to so administer [the Trust] as to secure the largest measure of legitimate advantage to the beneficiary of it[,]' and that it 'owes a higher duty to the public than does an ordinary businessman.'" *Montanans for the Responsible Use of the School Trust v. Darkenwald*, 2005 MT 190, ¶ 24, 328 Mont. 105, 119 P.3d 27 (citing authority).

2. The Board consists of the Montana Governor, Superintendent of Public Instruction, Auditor, Secretary of State, and Attorney General.

3. The Montana Department of Natural Resources & Conservation (DNRC) Trust Land Management Division (TLMD), among other things, manages the trust lands for the Board.

/////

[2] "The facts so specified must be treated as established in the action." Mont.R. Civ. P. 56(d)(1).

4. Montana holds the trust lands as a sovereign trustee for the exclusive support and benefit of beneficiary institutions.

5. Sometime after 1991, TLMD began asserting State ownership over pre-1973 water rights developed and diverted on private land and used on trust lands.

6. In late 2015, TLMD examined every trust land parcel and found 141 (now 144-172) post-1973 ground water rights with places of use located on trust lands and developed and diverted from private lands.

7. Montana was only listed as an owner or co-owner on 28 of the 141-172 post-1973 ground water rights.

8. Since TLMD believed it was precluded from claiming any ownership interests in the identified ground water rights, it determined that a Form 608 ownership update was the most appropriate method for asserting Montana's ownership interest to the identified ground water rights.

9. Thereafter, TLMD mailed 141 notification letters to the affected ground water right owners.

10. Next, TLMD sent 141 Form 608s to DNRC Water Rights Bureau.

11. Upon filing by DNRC, the 141 ground water right holders received an updated water right abstract that included Montana as a co-owner of the ground water rights with places of use located on trust lands which were developed and diverted from private land because of the Form 608 being processed.

12. Affected private water right holders did not have a statutory basis to object to TLMD's Form 608 filings with DNRC.

13. HB 286 passed both 2019 legislative branches.

14. HB 286 was delivered to Governor Bullock. He neither signed nor vetoed HB 286 and by operation of law, it went into effect ten days after it was delivered to him.

15. HB 286 became effective on May 11, 2019.

16. Advocates for School Trust Lands (ASTL) is the successor in interest to Montana for the Responsible Use of the School Trust (MonTrust).

17. ASTL is a non-profit membership social advocacy organization.

18. ASTL members include educators, parents, school board members, state land commissioners, productive land users and others working to ensure the trust land commitment to today's school children and future generations is honored.

19. ASTL members, directors, and officers include parents of children who attend Montana public schools or universities, or reasonably expect they may attend in the future.

20. K.B. and K.B. are minor children who attend public Montana public school.

21. Martin Balukas is K.B. and K.B.'s natural father and general guardian.

22. Intervenor Montana Farm Bureau Federation (MBFB) is an independent, non-governmental, voluntary organization.

23. MBFB is Montana's largest general agricultural organization.

24. MBFB has over 20,000 members.

25. Intervenor Montana Stockgrowers Association (MSGA) is a Montana non-profit membership organization.

26. MSGA has over 1,435 Montana independent ranching members.

27. Intervenor Montana Water Resources Association (MWRA) is a non-profit Montana public benefit corporation with members. It participates in Montana water related legislative, regulatory, and policy development activities.

28. Intervenor Association of Gallatin Agricultural Irrigators (AGAI) is a Montana non-profit mutual benefit corporation with members. It participates in all water right related issues including local, regional, and state policy proposals.

29. MBFB, MSGA, MWRA and AGAI respective representatives and members testified during the 2019 Legislative Session in support of HB 286.

30. *Amicus* Rural Montana Foundation (RMF) is a Montana non-profit public benefits corporation without members. It supports rural Montana agricultural and communities for rural economic viability.

31. It is unknown whether Montana classifies and leases any of the identified 141 (now 144-172) trust land parcels to various leaseholders as irrigable land on a crop share basis.

32. Irrigable trust land holdings leased on a crop share basis are more valuable to Montana than dry trust land holdings leased on a crop share basis.

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33. It is unknown how many of the identified 141 (now 144-172) trust land parcel lessees complied with Mont. Code Ann. § 77-6-115.

34. It is unknown whether the affected trust land respective values will be reduced by HB 286.

35. The water rights at issue are used either in whole or in part on the identified trust lands.

**REVIEW STANDARDS and CONTROLLING AUTHORITY**

**Justiciability, Standing and Ripeness**

Justiciability is a legal question. See *Northfield Ins. Co. v. Mont. Assn. of Counties*, 2000 MT 256, ¶ 8, 301 Mont. 472, 10 P.3d 813. The standing and ripeness doctrines, among others, are categorized under the broad justiciability umbrella. *Id.* Here, among other things, Plaintiffs seek a declaratory ruling that HB 286 is unconstitutional. The Uniform Declaratory Judgments Act's (Act) purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations...." Mont. Code Ann. § 27-8-102 (2019). Under the Act, a district court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201 (2019). "Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." Mont. Code Ann. § 27-8-202 (2019). A district court "may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Mont. Code Ann. § 27-8-206 (2019). Consequently, a

justiciable controversy must exist before a court may exercise jurisdiction under the Act. *Northfield Ins.*, ¶ 10.

As the *Northfield Court* indicated, whether a justiciable controversy exists requires a district court to review three elements:

> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.
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> We apply the justiciable controversy test to actions for declaratory judgment to prevent courts from determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, declaring social status, dealing with theoretical problems, answering moot questions, or giving abstract or advisory opinions.

*Northfield Ins.*, ¶ 12 (citations omitted).

> A party must have standing—that is, a personal stake in the outcome—for a court to decide a case. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶¶ 14-16, 340 Mont. 56, 172 P.3d 1232. Standing is a threshold, jurisdictional requirement that "limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187. To meet the case-or-controversy requirement, a plaintiff must clearly allege a past, present, or threatened injury to a property or civil right and the injury must be one that would be

> alleviated by successfully maintaining the action. *Bullock*, ¶ 31; *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430; *Heffernan*, ¶ 33. Prudential standing is a form of judicial self-governance that discretionarily limits the exercise of judicial authority consistent with the separation of powers. *Bullock*, ¶ 43. The Legislature "may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Heffernan*, ¶ 34 (internal quotations and citations omitted).
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> An association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when: (1) at least one member would have standing to sue in his or her own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit. *Heffernan*, ¶ 43. Associational standing "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Heffernan*, ¶ 44.

*Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶¶ 19-20, 396 Mont. 194; 445 P.3d 1195.

In addition, the Montana Supreme Court has broadly interpreted the concept of standing and has stated that standing questions must be viewed in part in light of "discretionary doctrines aimed at prudently managing judicial review of the legality of public acts . . ." *Comm. for an Effective Judiciary v. State*, 209 Mont. 105,110, 679 P.2d 1223 (1984) (quoting *Stewart v. Bd. of County Comm'rs. of Big Horn County*, 175 Mont. 197,200, 573 P.2d 184, 186 (1977)). The *Committee for an Effective Judiciary* Court acknowledged the New Mexico Supreme Court's recognition that private parties should be granted

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standing to contest important public issues. *Committee for an Effective Judiciary*, 209 Mont. at 110 (citing *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974)).

On the other hand, "[r]ipeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication, …." *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455 (citing authority). "In general terms, standing is concerned with whether a proper party is bringing suit, while ripeness is concerned with whether the suit is being brought at the proper time." *Id.* (citing authority).

"There is both a constitutional and a prudential component to the ripeness inquiry." *Id.* at ¶ 56 (citing authority). "The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to standing." *Id.* (citing authority). This component focuses on "whether the issues presented are definite and concrete, not hypothetical or abstract." *Id.* (citing authority). "The prudential component, on the other hand, involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citing authority). This component considers "whether there is a factually adequate record upon which to base effective review." *Id.* (citing authority). "The more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.*

**Mont. Code Ann. § 85-2-441's Constitutionality**

Plaintiffs have the burden to establish, beyond a reasonable doubt, that HB 286 is not, on its face, consistent with the constitutional trust land

mandates and Montana's duties as a trustee. *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800 (citing authority) (*MontTrust I*). The statute is presumed to be constitutional. *Id.* This Court has a duty to avoid an unconstitutional interpretation if possible. *Id.* "Any doubt is to be resolved in favor of the statute." *Id.* "[A] facial challenge is a 'difficult task,' requiring the challenger to demonstrate that no set of circumstances exists under which the challenged sections would be valid." *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶21, 391 Mont. 422, 419 P.3d 685 (citing authority).

> Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances. *The difference is important.* If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances.

*Marriage of K.E.V.*, 267 Mont. 323, 336, 883 P.2d 1246 (1994) (J. Trieweiler, specially concurring and dissenting) (emphasis original).

Notwithstanding, however, in Montana, "any law or policy that infringes on the [Board's] managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land." *Pettibone*, 216 Mont. at 371. In this regard, the *Pettibone* Court emphasized that "the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such

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property do so 'subject to the trust.'" *Id.* at 375 (citing authority). As such, Montana is not allowed to abdicate its trust land. *Id.*

**Summary Judgment**

Summary judgment is proper when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (*citing Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

Summary judgment should never be a substitute for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted). Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim to

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an extent that requires resolution by the jury. *State Medical Oxygen & Supply v. American Medical Oxygen Co.*, 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994) (citation omitted). If the trial court determines that no genuine issue of material fact exists, it then must determine whether the moving party is entitled to judgment as a matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610. It is universally recognized that "[t]he purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90, 93 (1992).

Summary judgment is "an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Heiat v. Eastern Mont. College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996). Summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne W. Bank v. Young*, 179 Mont. 492, 587 P.2d 401 (1978); *Kober v. Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

**Plaintiffs' Amendment Motion**

Rule 15, M.R.Civ.P., addresses pleading amendments. It provides, in pertinent part, that: "[a] party may amend the party's pleading once as a matter of course . . .." Mont. R. Civ. P. 15(1). After the 21-day grace period, "a party

may amend its pleading only with the opposing party's written consent or the court's leave. A court should freely give leave when justice so requires." Mont. R. Civ. P. 15(2).

"Generally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time and which would further justice; on the other hand, amendments which would result in undue delay or undue prejudice to the opposing party or amendments which would be futile need not be permitted." *Reier Broad. Co. v. Mont. State Univ.-Bozeman*, 2005 MT 240, ¶ 8, 328 Mont. 471, 121 P.3d 549. On the issue of futility, "it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought." *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155-56 (1991).

## DISCUSSION

**Justiciable Controversy Exists if Plaintiffs' Claims are Ripe**

In this declaratory judgment proceeding, the parties have an existing and genuine controversy regarding HB 286's constitutionality. If ripe, it is not a speculative or academic matter. There are no contingencies that may arise later. Whether HB 286 is constitutional is not a moot question. If ripe, the parties are neither dealing with a theoretical problem nor are Plaintiffs requesting an advisory or abstract opinion. Moreover, if ripe, a judgment by this Court will effectively end their controversy. Finally, a judicial determination regarding HB 286's constitutionality will be a final judgment upon the parties' respective rights relative to HB 286's legal force. Accordingly, if ripe, a justiciable controversy exists in this declaratory judgment proceeding.

**Plaintiffs Have Standing**

To meet standing's constitutional case-or-controversy requirement, Plaintiffs must explicitly allege a past, present, or threatened injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action. *Heffernan*, ¶ 33. Moreover, standing may rest not only on past or present injury, but also on threatened injury. See *Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112 (1997).

Montana, MBFB, MSGA, MWRA, AGAI, and RMF argue that Plaintiffs do not have standing to bring this lawsuit because neither the individual Plaintiffs nor ASTL, including its members, are able show any potential injury-in-fact to themselves as a result HB 286. In this regard, Montana claims "Plaintiffs will not suffer any injury as a result of the passage of HB 286 because it does not substantially change how the State may obtain an ownership interest in water rights."

Plaintiffs argue, in relevant part, that "HB 286 plainly changes prior law in ways that are constitutionally significant. Those changes don't just mimic §85-2-306, M.C.A. They retroactively revoke significant provisions of the state's trust land lease contracts."

The principal issue in this case is whether HB 286 is constitutional. This is a significant public interest issue which Plaintiffs have raised to vindicate their and the public's respective interests. Under the Enabling Act trust lands are designated "for the support of common schools." *MontTrust I*, ¶ 13 (citing authority). Plaintiffs contend HB 286 dramatically alters Montana's trustee rights, duties, and obligations in at least 141-172 trust land leases. HB 286 may reduce the associated trust land respective values. If true, any value reduction

will impinge upon Montana's high trustee duties relative to common school support and will therefore not be tolerated under Montana law. *Pettibone*, 216 Mont. at 371.

Moreover, K.B. and K.B. are minor children who attend Montana public school beneficiaries. Any reduction of trust land funding caused by HB 286 could potentially injure the quality of their Montana public education. In addition, ASTL, as the *Hefferman* Court requires, has standing to prosecute this matter on behalf of its members without an injury showing to itself because (1) at least one member would have standing to sue in his or her own right; (2) the interest ASTL's seeks to protect is germane to its purpose; and (3) neither ASTL's asserted claims nor requested relief requires each alleged injured party's participation in this proceeding. *Heffernan*, ¶ 43. The Court does not question that ASTL's members joined it "to [, among other things,] create an effective vehicle for vindicating interests that they share with others." *Heffernan*, ¶ 44.

Accordingly, each Plaintiff has standing to bring this lawsuit. HB 286's enactment and the Board and DNRC's apparent unwavering willingness to follow it presents matters of great public interest. Furthermore, since the Board is a constitutional agency charged with trust land administration for the benefit of common schools and Montana citizens, Plaintiffs should be permitted to raise valid constitutional questions concerning HB 286 that involve serious public importance. The *Pettibone* Court emphasized this public importance when it stated that it has "consistently held that any infringement on the use or management prerogatives of the State that effectively devalue school lands is impermissible." *Pettibone*, 216 Mont. at 273.

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**Plaintiffs' Claims Are Not Ripe**

Montana alleges, in relevant part, that "Plaintiffs' claims are not ripe because they assert no specific claim as to any individual water rights." It relies upon *Reichert* in this regard. It claims that "[b]ecause Plaintiffs have not identified, much less shown, that any specific water rights have been affected by HB 286, they ask this Court to issue a speculative, advisory opinion regarding the future treatment of water rights." At its heart, Montana argues, unlike the *Pettibone* record, that "no comparable underlying factual record exists to resolve Plaintiffs' claims."

Plaintiffs counter that "by now it should be clear that State officers themselves have disclosed 172 trust land water rights which are *in fact*, subject to HB286. Even if those 172 water rights were not currently identified, in a *facial* challenge, injury to future rights that will *necessarily* offend the constitution, is justiciable." (emphasis original). They rely upon *MonTrust* in claiming that simply because the alleged offending statute had not yet been used by Montana, such a fact should not preclude a constitutional challenge to the statute. "In both *MontTRUST*, and in this case, the facial unconstitutionality of the statutes in question means that ANY implementation of the statute will negatively impact the financial value of the school trust, which harms trust beneficiaries, including plaintiffs."

There is nothing in HB 286's plain language that impairs Montana's sovereign trustee duties or trust land "management prerogatives" to ensure that trust lands are not devalued by any policy or law. See *MontTrust I*, ¶ 36. Moreover, the current record contains no competent evidence that any of the trust land subject to the 141-172 rights has or will be negatively financially

impacted as a result of HB 286. Certainly, dry trust land is less valuable than irrigated trust land. Notwithstanding, however, there is no credible evidence that HB 286 will turn any current irrigated trust land into dry trust land. To say otherwise is speculative at best. Plaintiffs' arguments confuse and oversimplify the relevant facial constitutional inquiry. Here, the hypothetical constitutional claims are premised upon a hypothetical refusal by Montana to ignore its tremendous land trust trustee duties and allow lessees to do what they want, when they want and how they want on trust land as a result of HB 286. Only if Montana outright refused to perform its sovereign trustee duties or trust land "management prerogatives" so as to ensure that trust lands are not devalued by lessees under HB 286 would Plaintiffs' facial challenge pass the ripeness constitutional component. Further factual development would not only allow this Court's ability to deal with the claims presented, it is absolutely necessary. Accordingly, as to the ripeness constitutional component, the injuries to the trust land caused by HB 286 as claimed by Plaintiffs are "too contingent or remote to support [their] present adjudication." *Reichert*, ¶ 55 (citing authority).

The factual record deficiencies also impact the ripeness prudential component. *Id.* There is simply an inadequate factual record "upon which to base effective review." *Id.* (citing authority). More facts are necessary for this Court to determine whether HB 286 is unconstitutional on its face. *Id.* The record is deafening silent whether HB 286 "reduces" the underlying trust lands' value. *Pettibone*, 216 Mont. at 371. In *Pettibone*, as Montana argues, the record was sufficient to show the associated trust land's value would be negatively impacted. Here, as Montana contends and this Court agrees, the factual record is

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insufficient which precludes a judicial determination whether HB 286, on its face, "is clearly [constitutionally] repugnant to school trust principles." *Id.* at 373.

Plaintiffs contend the matter is ripe because no additional facts are necessary for this Court to determine by operation of law whether HB 286, on its face, is constitutional. They contend HB 286 directly conflicts with *Pettibone*, various statutes and administrative rules and the underlying leases' language, actual and/or implied.

The *Pettibone* Court made it abundantly clear that "any law or policy that infringes on the [Board's] managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land." *Pettibone*, 216 Mont. at 371. It also stated that "[Montana] has no power, absent adequate consideration, to grant the lessees the permission to develop non-appurtenant[3] water rights, and every school trust lease carries with it this limitation." *Pettibone*, at 375. While Plaintiffs' reliance on Pettibone is well taken, this Court has no evidence before it that HB 286, on its face, reduces trust land values. Absent such an evidentiary record, the Court respectfully disagrees with Plaintiffs that their facial constitutional challenges to HB 286 are ripe under *Pettibone*. Under HB 286, the proper time to provide such evidence would be by Montana when it seeks the required judicial determination. Mont. Code Ann. § 85-2-441(2) (2019).

Furthermore, while this Court is aware there are a number of statutory provisions that may conflict with HB 286, it "[must presume] that the legislature would not pass meaningless legislation, and [therefore] must harmonize statutes relating to the same subject, giving effect to each." *Albright v. State*, 281 Mont. 196, 206, 933 P.2d 815 (1997). For instance, Mont. Code Ann.

[3] A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air, or heat from or across the land of another. Mont. Code Ann. § 70-15-105 (2019).

77-6-115(1) provides, in relevant part, that a trust land lessee must "make [a written] application to the board for permission to secure a water right to the land under the lease." *Id.* The lessee's application "must show how much of the land can be irrigated, the permanency of the water supply, and the probable cost of placing the land under irrigation." *Id.* Upon approval, the board must grant the lessee permission "to secure the desired water right for the land and to place the land under irrigation." *Id.* Moreover, "if the water right becomes a permanent and valuable improvement, then in case of the sale or lease of the land to other parties, the former lessee is entitled to receive compensation in the amount of the reasonable value of the water right, as in the case of other improvements[4] from the new lessee or the purchaser." Mont. Code Ann. § 77-6-115 (2) (2019). HB 286 in section 1 certainly appears, on its face, to contradict section 77-6-115(1)'s Board approval process.

The *Pettibone* Court declined to "construe" Mont. Code Ann. § 77-6-115 since the water rights at issue were not "perfected" by section 77-6-115. *Id.* at 374. As Montana, the Intervenors and *amicus* exhaustively point out, the disputed *Pettibone* water rights were developed from and used on trust land. HB 286 deals with water rights secured and developed on private land but used on trust land. Here, the record is silent as to how many of the 141-172 rights at issue here were perfected by the respective lessee under Mont. Code Ann. § 77-6-115. Moreover, it is unknown whether any of those 141-172 rights, if perfected under section 77-6-115, have become "permanent and valuable [improvements]" to the associated trust land. Like the *Pettibone* Court, this Court will not construe Mont. Code 77-6-115 as to the 141-172 rights since it is

[4] Under Mont. Code Ann. § 77-6-301, a lessee does not need the Board's permission to "place upon the lands a reasonable amount of improvements directly related to conservation of the land or necessary for proper utilization of it." Such improvement includes but are not limited to, irrigation ditches and wells. This statute may conflict with Mont. Code Ann. § 77-6-115 requirement of securing Board permission before securing a water right "to the land under the lease." Nonetheless, a former lessee is entitled to compensated for the reasonable value of the improvement by a new lessee. Mont. Code Ann. § 77-6-302(1) (2019).

unknown how many, if any, of those rights were perfected under that statute and are impacted by HB 286. To do otherwise would merely result in an advisory opinion. Consequently, it appears this issue must be adjudicated by Montana and the trust land lessee as provided in HB 286(2)(a).

Also, Plaintiffs dispute Montana, Intervenors, and *amicus* arguments that HB 286 merely clarifies existing law on water right claimants imposed under Mont. Code Ann. § 85-2-306[5]. That statute provides, in relevant part:

> (1) (a) Except as provided in subsection (1)(b), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works.
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> (b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.
>
> (c) If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

[5] In their proposed amended complaint, Plaintiffs contend Mont. Code Ann. § 85-2-306 and HB 286 are unconstitutional as applied.

Mont. Code Ann. § 85-2-306 (2019). Montana claims this statute "precludes any party – including the State – from obtaining an ownership interest in a water right when it does not own the ground water well used to appropriate that water."

Certainly, the record establishes there are between 141-172 post-1973 ground water rights with places of use located on trust lands and developed and diverted from private lands. During its 2015 research, TLMD learned it was listed as an owner on only 28 of the 141-172 post-1973 ground water rights. As a result, TLMD decided to utilize a Form 608 to assert its ownership interest to the identified ground water rights. Thereafter, TLMD mailed 141 notification letters to the affected ground water right owners. Next, TLMD sent 141 Form 608s to DNRC Water Rights Bureau. Upon filing by DNRC, the 141 ground water right holders received an updated water right abstract that included Montana as a co-owner of the ground water rights with places of use located on trust lands which were developed and diverted from private land as a result of the Form 608 being processed. The affected private water right holders did not have a statutory basis to object to TLMD's Form 608 filings with DNRC. HB 286 requires, among other things, for Montana to rescind its Form 608 water right trust land ownership claims. Mont. Code Ann. § 85-2-441(3) (2018).

In this regard, Plaintiffs' claims via section 36.25.134, A.R.M., Montana "claimed trustee ownership of *both* future *and* past water rights developed on trust land. And, by the doctrine of 'incorporation by reference,' this administrative rule became an enforceable term of every trust land lease thereafter." They also argue that Montana's "water right claims are *also* based on contract law applied via the leases and administrative rules." As such, they contend that each lessee, via the underlying lease, has already provided the

required section 85-2-306(b) consent for Montana to appropriate the water for the applicable trust land. They next claim HB 286 proponents' frustration with TMLD's Form 608 filings since "the ground water rights were theirs from the start, even though that is not, and never has been the law of Montana." They further argue that HB 286 "gives lessees the *right* to pipe water from private land onto trust land, regardless of whether or not that benefits the trust, and regardless of whether TLMD agrees.[6] It gifts the choice to the lessee, not the State." Plaintiffs believe these "facts" make their claims ripe since lessees are doing exactly what *Pettibone* forbids by "[infringing] on the state's managerial prerogatives over the school lands." Here, Plaintiffs blatantly misquote *Pettibone* at 702 P.2d 954. As repeatedly indicated by this Court, the *Pettibone* Court stated, in relevant part, ". . ..., any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated **if it reduces the value of the land**." *Pettibone*, at 371 (emphasis added). Plaintiffs' tainted *Pettibone* interpretation bolsters why their claims are not ripe. They have offered no credible evidence that HB 286, on its face, reduces the value of trust land and therefore interferes with the Board's trust land managerial prerogatives.

In harmonizing HB 286 and section 85-2-306 with the deficient evidentiary record, this Court is judicially constrained to agree with Montana, Intervenors, and *amicus*'s "clarification" arguments relative to a lessee's due process and adjudication rights. The *Pettibone* Court certainly recognized the lessees' respective due process rights via the adjudication process. *Pettibone*, at 375. Here, HB 286 emphasizes a similar due process and adjudication procedure to ensure a judicial determination relative to Montana's assertion, if any, of water rights developed on private ground but used on trust land. Despite Plaintiffs'

[6] Mont. Code Ann. § 77-6-301 does not require the Board's permission to place an irrigation ditch on trust land. There does not seem to be much difference between an irrigation ditch and an irrigation pipe as a trust land improvement.

arguments to the contrary, HB 286's adjudication process is a far better means than TLMD's Form 608 utilization. Since Mont. Code Ann. § 85-2-306 does not contain a similar "adjudication" provision, HB 286 certainly clarifies how any such water right dispute will be determined before Montana may claim a water right ownership interest for water developed on private land and used on trust land. While Plaintiffs believe such a process should not be afforded to trust land lessees since their leases are subject to the trust, a judicial determination, as required by HB 286 will effectively and fairly resolve any dispute whether Montana or the lessee own the water right interest used on trust land but developed on private land. Courthouses were built to resolve disputes upon the orderly and procedurally fair submission of relevant facts which are then applied to controlling Montana law. TMLD's Form 608 failed to provide the affected lessees fundamental fairness and due process. The same can be said with respect to section 85-2-306 application against the Board. Now, under HB 286, such water right disputes (private land well water used on trust land) will be judicially adjudicated upon a proper evidentiary record.

Finally, Plaintiffs' "Stranglehold Clause" arguments resonate with *Pettibone's* alternative opinion grounds. *Pettibone*, at 373. They claim, similar to *Pettibone*, that if a lessee lost their trust land lease while owning water rights developed on their private property and used on the trust land, then, in that event, the former lessee would be able to control the trust land's use via HB 286. The *Pettibone* Court found that such a circumstance "is clearly repugnant to school trust principles." *Id.* (citing authority). It appears this position can be harmonized by the timely utilization of Mont. Code Ann. § 77-6-302 just as the *Pettibone* Court noted that "[s]ection 77-6-302, MCA actually insulates the developerlessee

from any market risk that he would have to bear if making improvements on his own land." *Id.* at 375. Furthermore, it remains unknown whether any of the 141-172 rights were acquired under Mont. Code Ann. § 77-6-115 which may also moot Plaintiffs' Stranglehold Clause position.

The bottom line to all of Plaintiffs' arguments is that they want this Court declare HB 286 facially unconstitutional on a deficient evidentiary record. The ripeness doctrine precludes such a judicial declaration.

Accordingly, this Court agrees with Montana, Intervenors, and *amicus* that Plaintiffs' current declaratory judgment lawsuit "is [not] being brought at the proper time." *Reichert*, ¶ 55 (citing authority). Plaintiffs' facial constitutional challenges to HB 286 are, currently, "hypothetical or abstract" since the present judicial factual record is devoid of the necessary evidence for a judicial determination. *Id.* Plaintiffs' facial constitutional challenges to HB 286 are currently not ripe for a declaratory determination.

**Summary Judgment Motions**

Since Plaintiffs' claims are not ripe, Montana's summary judgment must, and shall be, **GRANTED**. Consequently, Plaintiffs' partial summary judgment must, and shall be, **DENIED**.

**Amendment Motion Should be Denied**

Plaintiffs' proposed amendments include an "as applied challenge" to HB 286 and Mont. Code Ann. § 85-2-306 constitutionality. They also seek fees and costs from Intervenors.

Montana and Intervenors argue that Plaintiffs' proposed amended complaint is futile since it does not cure Plaintiffs' complaint's justiciability problems. This Court has already determined that Plaintiffs' HB 286 facial

constitutional challenges are not ripe. Plaintiffs' proposed amended complaint does not cure the evidentiary record deficiencies. They have alleged no additional facts to show that their as applied challenge to either HB 286 or Mont. Code Ann. § 85-2-306 are ripe. *Hobble-Diamond.*, 249 Mont. at 325.

Accordingly, Plaintiffs' motion to amend their complaint is **DENIED**.

**ORDER**

For the reasons stated above, **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that:

1. Montana's Summary Judgment Motion is **GRANTED**;
2. Plaintiffs' Partial Summary Judgment Motion is **DENIED**;
3. Plaintiffs' Motion to Amend their Complaint is **DENIED**;
4. Plaintiffs' Complaint is **DISMISSED**; and
5. The September 6, 2020 stipulated Protective Order is **DISMISSED, VACATED and QUASHED**.

**ORDERED** this 13th day of April 2021.

MICHAEL F. McMAHON
District Court Judge

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## CERTIFICATE OF SERVICE

I, Roy H. Andes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-31-2021:

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