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.

Appellant's Reply Brief

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

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CORRECTED STATEMENT OF FACTS

I. The "Answer Brief of Appellees" (AG Brief), at p. 20, assailed "ASTL's cavalier treatment of the facts," referencing this counsel's mistakes computing the number of water rights subject to HB286 (now §85-2-441, M.C.A.) Those water rights are listed on the 15-page spreadsheet prepared by TLMD's hydrologist, Dennis Meyer, produced in discovery by the State.[1]

Previously, I apologized to the District Court for my mistakes interpreting Meyer's spreadsheet.[2] I must do so again. In "Brief of Appellant ASTL" (ASTL Brief), on p.5, my numbers were off, again. The paragraph, as-corrected, should read,

> Mr. Meyer then filed a Form 608 "Ownership Update" with WRB to recapture the State's ownership claims to ~~114~~ **141** groundwater rights.[3] For ~~110~~ **135** of those rights, the point of diversion was private land, but the first place of beneficial use was state trust land.[4] The other ~~4~~ **6** rights were first used on private land, and later moved to trust land.

I apologize again for my errors.

Mr. Meyer's spreadsheet depicts 172 water rights, most involving "places of use located on school trust lands but without the [State] listed as an

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[1]D.C.Doc.34, Ex.D, pp.D-006 to D-020.

[2]Plaintiff's Reply Brief .., Doc.69, p.5, lines.10-17.

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

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

owner."[5] [*The following Table lists pertinent Meyer categories*]. Meyer splits those 172 water rights into three groups: Tab 1 detailed 141 water rights for which Meyer "identified and filed ownership updates.." *Id.* Tab 2 listed three water rights on which Meyer *did not* file updates. *Id.* Tab 3 depicted 28 water rights for which, apparently, the lessees *themselves*, recorded the rights listing the trusts as part owner. *Id.*

Meyer Spreadsheet	Number of H_20 rights	Orig. POU on private land	Impacted by HB286?
Tab 1- Updates filed	141	6	135
Tab 2- No update filed	3	0	3
Tab 3- State already listed	28	3	25
Totals	**172**	**9**	**163**

Because Mr. Meyer had included 9 water rights in his survey which were *not* originally used on trust lands, his spreadsheet labeled them, "No," in the column entitled "Was a State POU on Original Filing?" These are *Kunnemann*-type situations, where the original water right was applied *solely* on private land, and subsequently relocated to trust land.[6] The Table above splits out those nine rights. The Table's last column reflects whether the water rights, as classified by Meyer, are impacted by HB286.

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

[6]*Kunnemann v. Mont. Dep't of Nat. Resources*, Case No. 43A-A, 2000 Mont. Water LEXIS 1, *12 (Mont. Water Ct. 2000).

Rather than a "cavalier treatment of the facts," as characterized by our opponents, the causes of my mistakes were more benign. They arose in part from my ineptitude reading a long spreadsheet and coherently counting as I do so. They also resulted from the fact that Mr. Meyer –the most important witness in this case– was never deposed before the Attorney General filed his summary judgment motion. Absent further discovery, ASTL had no way to obtain explanations from Mr. Meyer.

The Attorney General criticizes ASTL for not requesting more discovery when he filed his summary judgment motion.[7] But at the time, the issues were narrower. It wasn't until the District Court premised its opinion *sua sponte* on allegedly missing evidence of "negative financial impact" to the trusts that the need for more discovery became clear.[8]

II. Contrary to the example on p.4 of the Attorney General's "Statement of Facts," the *vast majority* of the water rights on the Meyer spreadsheet were ***not*** perfected on private land, then later "transferred" to trust land (*Kunnemann* situations). Fully 163 of the 172 water rights were originally perfected on trust lands. So, 95% of the listed water rights were *never* used on private land. (Neither TLMD, nor ASTL ***in this case***, seek to assert any trust claims to *Kunnemann*-type water rights).[9]

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[7]AG Brief, p.40.

[8]D.C.Order, p.8, ¶34; p. 18, ln.25; *see,* pp. 19, 20; "[plaintiffs] have offered no credible evidence that HB 286, on its face, reduces the value of trust land." *Id*, p.24.

[9]DNRC Dir. Tubbs, testimony, ASTL Appx.#2, p.5 (14), at 16:57:58.

ARGUMENT

This case presents a contest between competing "presumptions."[10] It does not finally decide the ownership of anyone's water rights, but rather, what ownership principles will be employed in subsequent adjudication.

In *Pettibone*, this Court determined that when a water right is perfected for use on trust land by a lessee, the trust shall own the water right, and the right is appurtenant to trust land.[11] The particular facts of a case may overcome that *Pettibone* "presumption," as happened in *Kunnemann.* By contrast, HB286 imposes a diametrically conflicting presumption: that groundwater applied to trust lands with a point of diversion on private land is owned by the lessee.

With or without HB286, ownership of the affected water rights will be decided later in adversary forums, whether district court or administrative. At issue in *this* case is which "presumption" will apply, that of *Pettibone*, or that of HB286.

Our opponents propound two over-arching incorrect assertions.

(1) That the trust lessee's due process rights are at stake in this case; and

(2) That no justiciable harm occurs to trust beneficiaries from the "procedural" provisions of HB286.

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[10] *See*, *Bryan v. Yellowstone County Elementary School District,* 2002 MT 264, 60 P.3d 381, 312 Mont. 257, ¶52 (Mont. 2002) (precedent in effect creates presumptions for future cases); Walker, John M., The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Feb. 29, 2016 ("like cases should be decided alike").

[11] *Pettibone*, 702 P.2d, at 952 ("The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State").

It so arguing, our opponents mistakenly conflate three discrete issues:

a. what legal principles govern ground water used on trust lands,

b. what process is used to apply those principles to specific facts, and

c. who gets a vested property right at the end of the process.

The issue in this case is ***not*** who will be owners of the 163 water rights identified as impacted by HB286. Nor is the "process" for litigating those rights in dispute. The only issue is *what legal principles will be applied* in that process.

What HB286 did was to impose it's presumption of lessee ownership, ***retroactively***, and command that all 163 water rights "asserted or acquired" by the trustee be "rescinded" (even the 28 water rights voluntarily recorded by lessees in the name of the State). That presumption, applied solely to trust lands (not to any others), is manifestly contrary to the constitutional principles of this Court in *Pettibone*. And the presumption, alone, devalues the trust.

Should ASTL's opponents prevail in this appeal, it may effectively eviscerate the power of trust beneficiaries to challenge the state trustee for breaches of its fiduciary duties. The state as trustee, *alone*, possesses the ability to account for its trust management practices. The District Court, and our opponents, would put the burden, instead, on the beneficiaries to *quantify* how much they are harmed, even in the face of yet-incomplete discovery from the trustee, itself.

Instead of representing the interests of beneficiaries, as he should be,[12] the Attorney General takes the side of trust lands consumers, defending their legislatively-sanctioned grab for trust property. With respect, the Attorney General in this case should at least have followed the ethical practices of the Arizona Attorney General in *Lassen v. Arizona*, who appointed counsel to represent *both sides* of the case.[13] He instead forces Montana trust beneficiaries to fight this contest alone.

I. This case is "ripe," and ASTL did not "waive" the issue.

The Attorney General argues that ASTL "waived" all other issues in this case by not identifying "ripeness" as an issue on appeal, and for not arguing "ripeness" by name. AG Brief, at 15-18, *citing*, *State v. Makarchuk*,[14] and *Reichert v. State*.[15]

But, *Makarchuk* is inapposite. Makarchuk challenged the constitutionality of a statute for the first time on appeal, and only in his reply brief. ASTL has done nothing like that.

ASTL's opening brief *did* discuss the *substance* of the district court's ripeness ruling, albeit not labeling it "ripeness." Instead, we discussed the

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[12] §72-38-221, M.C.A., *see, generally* Montana Uniform Trust Code, Title 72, Chap. 38.

[13] *Lassen v. Arizona*, 385 U.S. 458 (1967), footnote 1.

[14] 2009 MT 82, ¶19, 349 Mont. 507, 204 P.3d 1213.

[15] 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

District's Court's erroneous factual premises for its ripeness ruling: Whether "trust lands subject to the 141-172 rights had or will be negatively financially impacted as a result of HB286," and whether "the injuries to the trust land caused by HB286 as claimed by Plaintiffs are 'too contingent or remote to support [their] present adjudication.'" We addressed them in our brief, at "Summary of Arguments" ¶2; and pages 6-7, 15, 19, 20-23, & 27.

Reichert v. State actually supports ASTL's case. The District Court ruling was substantively based on prudential ripeness. *Reichert* observes that prudential ripeness invokes judicial discretion, saying,

> The prudential component, .. involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.[16]
>
> ..deference and restraint do not apply, however, where a challenged measure is facially defective. In that event, the courts have a duty to exercise jurisdiction and declare the measure invalid. *Reichert.* 278 P.3d, at 474, ¶59.

Even on the skinny record of this case, HB286 unconstitutionally injures the trusts: 1– by imposing a presumption of *private* water right ownership in all disputes with the trusts (contra *Pettibone,* and existing lease terms); 2– mandating retroactive revocation of the trusts' administrative claims; 3– increasing the cost of the trustee's case-by-case litigation in all attempts to undo harms #1 and #2. Even as a mere *"procedural"* statute (as characterized by our opponents), HB286 is facially defective.

This country's leading case on federal land trusts is *Lassen v. Arizona*. It

[16] *Reichert*, 278 P.3d,at 472, ¶56.

is instructive about the ripeness issues here. In *Lassen*, the US Supreme Court prohibited Arizona from (1) employing a conclusive presumption that giving free highway rights-of-ways across trust lands enhanced the value of the remaining land. *Lassen* also (2) prohibited Arizona even from conducting a case-by-case analysis of enhancement.[17] *Lassen* involved no specific land parcels, only general legal principles.

On the case-by-case enhancement issue, in *Lassen* the United States Attorney General, as *amicus,* urged in substance that the issue was unripe. But the Court held otherwise, saying,

> If we severed the conclusion from its premise, we would halt short of a full adjudication of the validity of the Commissioner's rules, and unnecessarily prolong the litigation of this important question. *Id*.

The Court then proclaimed,

> All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust. *Id.*, p.467.

Thereby the US Supreme Court chose to address the broadest applicable questions in order to vigorously enforce state trust responsibilities. Respectfully, this Court, again, as it did in *Pettibone*, should follow *Lassen*.[18] (Our opponents have persistently disregarded *Lassen* in this, and the lower court).

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[17] *Lassen*, 385 US, at 465-466.

[18] 702 P.2d, at 953.

A. Constitutionality of HB286 is "ripe" without addressing each individual water right.

At pages 18-23, the Attorney General characterizes this "omnibus" case as "un-ripe" for failing to,

> ..adequately address the individual and specific fact circumstances of the water rights at issue. ...While ASTL has invoked, on appeal, ..water rights that might be impacted by HB286, it does not assert sufficient facts that would establish the State as an owner of these rights.[19]

The Attorney General later urges,

> At bottom, a lawsuit that attempts to treat a large number of factually distinct water rights in the exact same fashion will be procedurally and factually deficient. *Id*, p.20.

First, the water rights on Mr. Meyer's spreadsheet are *clearly* impacted by HB286. Mr. Meyer prepared it precisely for that illustrative purpose.[20]

Moreover, contrary to the repeated mis-attributions of our opponents, ASTL is ***not*** seeking *in this case* to "establish the State as an owner of these rights." We are litigating about the *presumptions* that will apply in subsequent cases, specifically, the presumption HB286 imposes. Compare, *Lassen, supra*.

Montana statutes require that the cost of that case-by-case litigation of water rights be paid from trust revenues.[21] So when that litigation starts with a presumption *against* the trust, and without benefit of recorded WRB Form

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[19]AG Brief, pp. 18-19.

[20]ASTL Appx.#4, final ¶, & #5, ¶¶10-11.

[21]§77-1-108, M.C.A., §77-1-109, M.C.A. (directing payment of State trust administration expenses from trust revenues).

608s,[22] win or lose, those processes will be more costly for the trusts.[23] As discussed in our opening brief, at pp.20-21, and reviewed, *infra*, p.17, such "procedural" statutes can, and often are, found unconstitutional without joining all of the persons who may eventually be subject to them.[24]

ASTL's opponents also urge that the issue of "appurtenance" remains to be litigated, and requires case-by-case adjudication of individual water rights claims.[25] Their argument ignores again, (1) that challenge to HB286 isn't about *vesting* specific water rights, but only about whether the trust comes to court burdened with a presumption against it. (2) It also ignores that *Pettibone*, explicitly said "the State has no power, ..to grant the lessees the permission to develop *non-appurtenant* water rights.." [26] Further, *Pettibone* explicitly rejected the appurtenance principles of then-existing law, holding, "school trust lands are subject to a different set of rules than other public lands." [27]

B. The purportedly "procedural" nature of HB286 doesn't defeat ripeness.

The Attorney General argues at pp.23-24,

HB 286 clarifies the process by which the State may obtain an

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[22]As commanded by subsection (3) of HB286.

[23]ASTL Appx#2, p.17.

[24]*See*, *MonTRUST 1 & Jerke v. DSL, 182 Mont. 294, 597 P.2d 49 (1979), infra; Lassen v. Arizona, supra*.

[25]AG Brief, pp.21-23, 25; Intervenors Brief pp.35-39.

[26]702 P.2d, at 957 (emphasis added).

[27]*Id.*, at 955.

> ownership interest in a ground water right with a point of diversion on private land and place of use on State trust land.[28]

That's simply incorrect. HB286 doesn't change the "process." It changes the *presumptions*, substantively shifting burden of proof.

Intervenors argue that HB286 creates no "new" presumption because it merely echos §85-2-306 (1)(a), M.C.A. requiring groundwater claimants to have "exclusive property rights in the ground water development works."[29] But, Intervenors fail to disclose that §85-2-306(1)(b) *explicitly* allows water rights claims "with the written consent of the person with those property rights." The trusts have had "written consent" via leases and administrative rules, ever since 1979.[30] HB286 retroactively presumes those lease terms and rules to be inapplicable.

With, or *without* HB286, there are two processes that apply to resolve ownership of disputed ground water rights. For exempt groundwater claims it will be district court; for provisional permits, it will be an administrative hearing. HB286 created no new *procedures*. It, instead, demands the state trustee enter each process with a huge disadvantage (in contravention of *Pettibone*). That disadvantage, alone, provides ripeness. (discussion, *supra*, at I).

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[28]See, also, Intervenors Brief, p.21, *Amicus*, pp.3-5.

[29]Intervenor's Brief, p.19.

[30]§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.

II. HB286 did not resolve any due process problems with water rights claims, and due process is unscathed by this case.

Our opponents all join the Attorney General in asserting,

> The primary purpose of passing HB286 was to avoid the due process concerns associated with TLMD's intra-agency filing of Form 608. "...Water rights are property rights and "[d]ue process mandates notice and the opportunity to be heard prior to modification of those rights."[31]

But they found their "due process" argument on the false premise that the Water Rights Bureau took away anyone's rights when it recorded Form-608 Ownership Updates for TLMD.[32] ASTL could likewise argue that the Bureau *improperly* accepted 136 unilateral Form-602 water rights claims without "written notification to landowner," *i.e.*, the State as trustee.[33]

Both assertions are immaterial. That's because what is, or isn't, recorded with the WRB has no conclusory impact on title disputes to water. The WRB is a mere claims registry, analogous to the county clerk who records many kinds of property records. A clerk will record a construction lien regardless of its enforceability. It remains for courts to *subsequently* resolve the *legal effect* of such documents, if any, on someone's title.

In recognition of such a limited role, the WRB states on its Form-608,

> This form is for DNRC record keeping purposes only as required by MCA 85-2-101(2). *The deed is the legal document transferring the*

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[31]AG Brief, at 26-27; Intervenors Brief, p.18, 21-25; *Amicus*, p.1.

[32]D.C.Doc. 60, pp. 3-5.

[33]D.C.Doc. 33, Ex. G, ¶9.

water right.[34]

The form thus repeats WRB's administrative rule which says, in substance, the very same thing.[35]

In short, neither the lessees' self-serving water rights claims, nor the TLMD's Form-608 update filings, determined *anyone's* vested"title" to the water rights. All they did was create a public record of disputed *claims* to those rights. The WRB's ensuing water rights certificate can be challenged, by "any remedy legally available." §85-2-381(4), M.C.A. The disposition of "permitted" groundwater claims is similar, being merely "provisional."[36]

So, the recording of all these WRB documents deprived no one of any "due process" rights. They merely put others on notice of the "claims."

The Attorney General and Intervenors also incorrectly charge ASTL with urging, "that this Court should declare that these water rights automatically vest to the State under *Pettibone*."[37] ASTL has never made any such assertion, but our opponents erection of such a strawman presumably

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[34]Doc. 34, Ex.A, emphasis added.

[35]§36.12.101 (43) ARM.

[36]§85-2-101(5), M.C.A., provides,
...the legislature has provided an administrative forum for the factual investigation into whether water is available for new uses and changes both before and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the absence of a complete adjudication in the source of supply, permits issued under this chapter are provisional. A provisional permit is subject to reduction, modification, or revocation by the department as provided in 85-2-313 upon completion of the general adjudication.

[37]AG Brief, p.27, Intervenors Brief, pp.24, 42.

makes their arguments sound more convincing. In support of that strawman, the Attorney General quotes an ASTL brief which said, "In a nutshell, *Pettibone* held that under constitutional trust principles, the State automatically becomes owner of water rights developed for use on trust lands."

Once again, the Attorney General confuses legal principles, with the adjudicated results of applying them. That quotation merely summarizes *this Court's* declared constitutional principle. Those principles, like a "presumption," *do not* dictate whether, in every case, they will necessarily be applicable. Conversely, however, as seen in *Lassen*, *MonTRUST*, et al., general legal principles can determine whether a statute is unconstitutional on its face when improperly applied to a substantial class of cases.

III. Our opponents, like the district court, ignore uncontradicted harm to trust beneficiaries from any implementation of HB286.

Our opponents echo the District Court in building all their arguments on alleged "lack of evidence" of financial harm to the trusts from HB286. But, the evidence is there: From the Director of DNRC,[38] from the State Budget Director,[39] and from as-yet un-supplemented discovery from the Attorney General.[40]

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[38]ASTL Appx#2, *pp.14-17*, summarized, ASTL Brief at 6-7.

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

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

IV. Our opponents *sui generis* trust law arguments distort trust precedent, and ignore Art. 10, Sec 11(1) of the Constitution.

The Attorney General invents a unique perspective on Montana's trust obligations by narrowing it to two principles cited in *Pettibone* (as if those two encompassed the entire law of trusts). AG Brief, p.30. He then propounds the unprecedented conclusion, "The first of these obligations concerning fair market value is also known as the duty of loyalty." *Id.* And later, "because HB286 does not implicate the disposal of assets, it does not trigger the duty of loyalty." *Id*, p.34. He rationalizes his statements by citing *one* paragraph of *MonTRUST 1* which applied *one* aspect of the duty of "loyalty." *Id.* at 30.

Next, the Attorney General singularly proclaims that "..the State's managerial prerogatives is encapsulated within the policy of sustained yield." *Id.*, p.31. Citing *Jerke*, he again extrapolates backward from the conclusion of *Jerke* to redefine the whole duty of loyalty. Thus reframed, he urges an interpretation of "managerial prerogatives" in ASTL's case which is inconsistent with *Pettibone* (which turned in part on "managerial prerogatives" but with no implication of "sustained yield").[41]

The Attorney General is not just cherry-picking bits of law to suit his conclusion. He propagates a new and reductive law of trusts.

The Attorney General takes particular umbrage that ASTL asserts in certain circumstances the burden of proof shifts to the trustee to prove its conduct has not harmed beneficiaries. *Without citation to authority*, he rejects

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[41] *Pettibone*, 702 P.2d 948, 953-954.

reference to Washington's *Skamania* case on point (thereby ignoring *Pettibone's* heavy reliance on *Skamania*).

By ignoring abundant authority applying the common law of trusts to state trust land management,[42] he is also turning his back on Art. 10, Sec 11(1) of the Constitution. It states in pertinent part,

> All lands of the state that have been or may be granted by congress, .. *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. (Emphasis added).

Those italicized words are *terms of art*. By suggesting this Court ignore the common law of trusts (Montana trust code, and the Restatement of Trusts), the Attorney General rejects that explicit constitutional command.[43]

Furthermore, because these land trusts were created by Congress, they invoke federal law. So, federal decisions, like that of the US Supreme Court in *Lassen vs. Arizona*, are controlling. Likewise, precedents from elsewhere, such as Washington's *Skamania* case (with whom Montana shares its Enabling Act), deserve great respect. ASTL's opponents pay heed to none of them.

Concerning the "managerial prerogatives" issue, the Attorney General

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[42] *See, authorities,* ASTL Brief, at pp.9-12.

[43] *National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918 (Utah 1993) ("***Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees***"); *County of Skamania v. State*, 685 P.2d at 580 (same); *Hill v. Thompson*, 564 So.2d 1, 6 (Miss. 1989); *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)("***state in acting as a trustee is subject to [trust law], and when its status as a trustee is fixed by the Constitution a violation of its duty as a trustee is a violation of the Constitution itself***"].

contends HB286 is "saved" from unconstitutionality by coupling it with existing authorities regulating improvements on trust lands (specifically §36.25.125 allowing water rights improvements only with "approval of the department.") *Id.,* pp. 36-37. The Attorney General errs however because the legislature commanded HB286 to be "retroactive." Thus, TLMD never had any opportunity to approve or disapprove the water rights claimed by the lessees as listed on the Meyer spreadsheet. And of course, HB286 empowers lessees to hold trust land hostage, exactly what *Pettibone* sought to prohibit.[44]

Equally astonishing is the Attorney General's statement, at p.37, "HB 286 does not improperly dispose of any water rights to former lessees," claiming, "it serves as a procedural path for the State to assert its interest in water rights." To the contrary, HB286(3) commands the trustee to "rescind any claim of ownership it asserted.." to water rights (the Form 608s). And it hobbles the trustee's"procedural path" under HB286, in *every* case, with presumptive ownership by the lessee.

As discussed in ASTL's opening brief, such categorical statutory "procedural" discrimination against beneficiaries' trust interests are regularly declared facially unconstitutional by this Court, and others. *MonTRUST 1.*[45] (§77-6-304 M.C.A. unconstitutional, despite conditional application, ¶¶44-51; §77-6-305, MCA, void despite option for permissive license, ¶¶55-58);

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[44]702 P.2d, at 955.

[45]*MonTRUST v. State* (1999), 1999 Mont. 263, 296 Mont. 402, 989 P.2d 800.

Skamania, *supra*, (statute allowed timber companies to default on executory trust contracts); *Oklahoma Education Assn. v. Nigh*, *supra*, (multiple facially unconstitutional statutes); *Ebke v. Bd. of Educational Lands, supra,* (procedural leasing statutes facially void).

Intervenor's complain ASTLs "omnibus..facial constitutional challenge" has "none of the water right holders"participating. Intervenors Brief, pp.32-33. But none of the trust cases cited above included all the affected third parties, either. *Skamania* had only *two*. That's because, like this case, they dealt with general constitutional principles, not title to specific rights. As noted in Part III, the lessees will have their individual day in court, later.

Intervenors cite *Montana Cannabis v. State* to argue HB286 is constitutionally acceptable under the federal *Salerno* rule.[46] Because some of Meyer's listed water rights may fall under the *Kunnemann* holding, Intervenors argue in that "set of circumstances" HB286 may produce a satisfactory result. But concerning the constitutionally of *trust lands statutes*, no case anywhere has employed that somewhat controversial[47] *"set of circumstances"* rule.[48] In *Montrust 1*, this Court acknowledged the possibility of constitutional application of the statutes, but voided them anyway, because they "allowed" violations of the

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[46]2016 MT 44, 382 Mont. 256, 368 P.3d 1131, ¶14, *citing*, *US v. Salerno*, 481 U.S. 739, 745 (1987).

[47]*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 ("Members of the Court have criticized the *Salerno* formulation...").

[48]*Authorities,* note 43. *Skamania*, 685 P.2d, at 583; *Lassen*, 385 US, at 465-466.

trusts.[49] Further, even when the trustee loses, litigation under HB286 will be more expensive for the trust because of the statute's presumptions.

V. Amicus' policy arguments are without evidentiary foundation and are contrary to *Pettibone's* policy.

At pp. 6-12, *Amicus* propounds some nicely written theories about what might happen if ASTL prevails. But *Amicus*' arguments are hypothetical, built on factual assumptions unsupported by evidence in the record. ASTL could likewise hypothesize about what will happen if HB286 remains law. But not having evidence to base it on, or the opportunity for more discovery or trial to produce such evidence, this is not the proper forum to do so.

Amicus arguments also conflict with *Pettibone*'s settled policy principles, intended to deny lessees' the power to "control the use of the land,"as "repugnant to school trust principles." 702 P.2d, at 955.

VI. ASTL's Amended Complaint should have been allowed.

The Attorney General adopts the District Court's circular reasoning that "no additional facts" were pleaded in the amended complaint to make the case justiciable, adding,

> ASTL simply affixes the phrase 'as applied' to its existing HB 286 claims and includes an additional 'as applied' challenge to MCA § 85-2-306(1). AG Brief, p.44.

The Attorney General disregards that the "facts" crucial to the District Court

[49] *Montrust, supra*. ¶¶38-43; ¶¶44-51; ¶¶55-58.

–evidence of "harm" to the trusts– *are* alleged in the amended complaint.[50] What are missing are factual details to *quantify* that harm. But that information is available *only* from the state trustee, who, under the law of trusts, has the duty to account. And, the Attorney General to date has failed to supplement promised discovery on those precise questions.[51]

In its order the District Court stated, "More facts are necessary for this Court to determine whether HB 286 is unconstitutional on its face." D.C. Order, p.19. Yet, by granting the Attorney General's summary judgment motion, and refusing ASTL's amendment, the Court prevented further development of any "more facts."

Intervenors also oppose amendment, arguing, "Appellant's claim for attorney fees against Intervenors fails as a matter of law and is futile." Intervenors Brief, p.48. But, they ignore the plain language of §72-38-1004, M.C.A., which states,

> In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, *to be paid by another party* or from the trust that is the subject of the controversy. (Emphasis added).[52]

Intervenors prepared, pushed, and passed HB286 for their members' benefit, and voluntarily joined this lawsuit. Clearly, they fall, *prima facie*, within the sweep of §72-38-1004.

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[50]First Ammd. Cplt, Doc. 25, ¶¶ 32, 36,

[51]ASTL Appx.#8 & #9, *passim* (State's discovery responses).

[52]*See,* Restatement 2nd of Trusts, §871.

CONCLUSION

ASTL respectfully renews its requests for relief requested in our opening brief.

RESPECTFULLY SUBMITTED this 6th day of December, 2021.

by 

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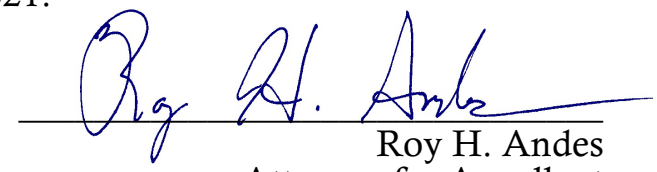
Certificate of Compliance

I hereby certify that the foregoing document complies with M.R.App.Proc. 11 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 4,924 words, excluding the table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

Dated this 6th day of December, 2021.



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CERTIFICATE OF SERVICE

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