IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 21-0314

ADVOCATES FOR SCHOOL TRUST LANDS,

Plaintiff and Appellant,

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

Plaintiffs,

v.

STATE OF MONTANA,

Defendant and Appellee,

MONTANA FARM BUREAU FEDERATION, MONTANA STOCKGROWERS ASSOCIATION, MONTANA WATER RESOURCES ASSOCIATION, ASSOCIATION OF GALLATIN AGRICULTURAL IRRAGATORS,

Intervenors and Appellees.

INTERVENORS' RESPONSE BRIEF

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2. Whether HB 286 violates this Court's holding in *Dept. of State Lands v. Pettibone*.
3. Whether the District Court erred in granting summary judgment to the State.
4. Whether the District Court erred in denying Appellant's Motion to Amend Complaint.

STATEMENT OF THE CASE

On September 6, 2019, Advocates for School Trust Lands ("Appellant") and K.B. & K.B., filed a Complaint against the State of Montana ("the State") alleging that House Bill 286 ("HB 286"), on its face, violates the Enabling Act and the Montana Constitution. Appellant also alleges that HB 286 violates this Court's holding in *Dept. of State Lands v. Pettibone*. On September 12, 2019, Advocates for School Trust Lands, K.B. & K.B., and the State of Montana stipulated to a preliminary injunction against the implementation of HB 286. The District Court granted the Joint Motion for Preliminary Injunction on September 18, 2019. On October 30, 2019, the Montana Farm Bureau Federation, Montana Stockgrowers Association, Montana Water Resources Association, and Association of

Gallatin Agricultural Irrigators (collectively "Intervenors") filed a Motion to Intervene, and the District Court granted the Motion on November 1, 2019.

Advocates for School Trust Lands and K.B. & K.B. filed a Motion to Amend their Complaint on October 26, 2020. Shortly thereafter, the State filed a Motion for Summary Judgment on October 30, 2020. Advocates for School Trust Lands and K.B. & K.B. filed a Motion for Partial Summary Judgment on December 22, 2020. Intervenors opposed and filed a Response on November 16, 2020. The District Court held oral arguments with Advocates for School Trust Lands and K.B. & K.B. and the State on April 12, 2021. Shortly after oral arguments, the District Court issued an Order on all pending Motions on April 13, 2021. The District Court granted the State's Motion for Summary Judgment and denied Advocates for School Trust Lands and K.B. & K.B.'s Motion for Partial Summary Judgment and Motion to Amend. A final judgment dismissing the Complaint was issued on April 19, 2021. One Plaintiff, Advocates for School Trust Lands, now Appellant, filed this Appeal on June 21, 2021.

STATEMENT OF FACTS

Beginning in 2015, Dennis Myer, a Water Rights Specialist for the Montana Department of Natural Resources and Conservation's ("DNRC"), Trust Land Management Division ("TLMD"), began examining every parcel of school trust land in the State of Montana. Doc. 34, Dennis Myer

Declaration, ¶¶ 1-2. TLMD discovered post-1973 groundwater permits and certificates with places of use on school trust land, without the State, DNRC, or TLMD listed as owners. *Id*. 141 of these discovered water rights were developed and diverted on private lands but used on school trust land. *Id*, ¶ 13. TLMD decided that these rights belonged to the State and acknowledged State ownership of these rights by filing a Form 608 Ownership Update with the DNRC. *Id*, ¶ 3. Once the 608 Forms were processed, a new abstract of the water right was generated with the State listed as a co-owner. *Id*, ¶ 8-9.

In response to the filing of the 608 Forms and changes of ownership, HB 286 was introduced to the Montana Legislature on January 23, 2019. Doc. 29 Declaration of Jeremiah Langston, ¶ 4. After several iterations, the bill passed 42 to 7 in the Senate and 90 to 9 in the House with bipartisan support. *Id*, ¶¶ 8-9. The Governor did not veto the bill and HB 286 became effective on May 11, 2019.

Through discovery in this matter, Dennis Myer has provided a spreadsheet of water rights with a point of diversion on private lands, but with places of use on school trust lands. Doc. 34, ¶¶ 10-11, Ex. D. The first tab spreadsheet shows 141 water rights with diversions or developments on private land but used on trust land. *Id*, ¶ 13. These are the water rights for

which the State filed 608 Forms and for which DNRC issued ownership updates adding the State as a co-owner. *Id*. The second tab shows three (3) groundwater rights with diversions or developments on private land but used on trust land, which received a Form 608 update on ownership. *Id*, ¶ 14. The third tab shows groundwater rights in which the State is already a co-owner. *Id*, 15. Some of the water rights, while currently used on trust land, were originally used off of trust land. *Id,* Ex. D-006 to -020 (several water rights state "no" under the column "[w]as a State [place of use] on Original Filing"). Every groundwater right identified in this litigation is a post-1973 water right. *Id*, ¶ 16.

STANDARD OF REVIEW

Here, the Court is reviewing the State's Motion for Summary Judgment and the Appellant's Motion for Partial Summary Judgment. In reviewing a district court's grant or denial of motion for summary judgment, this Court reviews the district court decision de novo for correctness in conformance with M.R.Civ.P. 56. *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 32, 403 Mont. 225, 256, 481 P.3d 198, 212. In summary judgment, "the moving party has the burden of establishing the absence of a genuine issue of material fact, and entitlement to judgment as a matter of law." *Smith v. Burlington N. & Santa Fe Ry.*, 2008 MT 225, ¶ 10, 344 Mont. 278, 281, 187 P.3d 639, 643.

"Once the moving party has met this burden, the non-moving party must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact." *Id*. "The non-moving party must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Hiebert v. Cascade Cnty*., 2002 MT 233, ¶ 21, 311 Mont. 471, 477, 56 P.3d 848, 854; *quoting Thomas v. Hale,* 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990). This Court reviews conclusions of law "upon which the district court bases its decision to determine if they are correct." *Smith*, ¶ 11.

In this case, the District Court ruled that Appellant's facial constitutional challenges to HB 286 were unripe and thus unreviewable. Justiciability issues such as standing or ripeness are all questions of law that this Court reviews de novo. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 100, 278 P.3d 455, 462. In addition, in determining whether a statute complies with the constitutional mandates of the trust and the State's fiduciary duties as trustee, this Court reviews "a district court's conclusions of law to determine whether they are correct." *Montanans for the Responsible Use of the Sch. Tr. v. Darkenwald*, 2005 MT 190, ¶ 22, 328 Mont. 105, 112, 119 P.3d 27, 33.

Here, Appellant has made a facial constitutional challenge to the

whole of § 85-2-441, MCA. "Statutes are presumed to be constitutional and it is the duty of the Court to avoid an unconstitutional interpretation if possible." *Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 406, 989 P.2d 800, 802; *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997). A party challenging the constitutionality of a statute "bears the burden of proving the statute unconstitutional. Any doubt is to be resolved in favor of the statute." *Id., quoting State v. Martel*, 273 Mont. 143, 148, 902 P.2d 14, 17 (1995). A statute will be "upheld on review except when proven to be unconstitutional beyond a reasonable doubt." *Id. quoting Davis v. Union Pacific R. Co.*, 282 Mont. 233, 239, 937 P.2d 27, 30 (1997).

The District Court also denied Appellant's Motion to Amend. In reviewing a motion to amend pursuant to M.R.Civ.P. 15, this Court reviews the district court's denial on whether the district court abused its discretion. *Geil v. Missoula Irrigation Dist.*, 2004 MT 217, ¶ 390, 322 Mont. 388, 389, 96 P.3d 1127, 1129.

SUMMARY OF ARGUMENT

Appellant has not met its burden of proof in establishing that HB 286 facially violates the 1889 Enabling Act and Montana Constitution. HB 286 correctly provides due process to constitutionally protected private water

rights, which are diverted or developed on private land but used on school trust land. The plain language of HB 286 does not change Montana water law or ownership of water rights. Appellant also fails to distinguish between "existing" water rights, existing at the time the Montana Constitution was adopted and permits with a priority date post-July 1, 1973. *Pettibone* dealt with the adjudication of pre-1972 water rights diverted or developed on school trust lands and then used on school trust lands. *Pettibone* certainly did not address or establish that TLMD would unilaterally claim ownership of post-1973 ground water rights diverted or developed on private land but used on school trust land without a hearing or process. Furthermore, HB 286 on its face does not devalue school trust lands. Therefore, Appellant's facial challenge fails as a matter of law.

ARGUMENT

I. HB 286 Restores Due Process

When challenging the constitutionality of a statute, it is presumed the statute is constitutional and any doubts are resolved in favor of the statute. *Montrust I,* ¶ 11. A facial challenge is even more stringent and requires the challenger to establish that "no set of circumstances exists under which the [challenged legislation] would be valid." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 73, 382 Mont. 256, 368 P.3d 1131. In addition, "the

fundamental rule in statutory construction is to determine the legislative intent of the statute." *Merlin Myers Revocable Tr. v. Yellowstone Cnty.*, 2002 MT 201, ¶ 19, 311 Mont. 194, 199, 53 P.3d 1268, 1271; *citing* § 1-2-102, MCA. "The first step in making this determination is to look at the plain language of the statute. If it is clear and unambiguous, no further interpretation is necessary." *Id.*

HB 286, codified at § 85-2-441 MCA, provides:

> **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).
> (4) For the purposes of this section, "state trust land" has the meaning provided in 77-1-101.

The plain language of HB 286 creates a process and protects constitutionally protected water rights.

In Montana, there are two separate legal schemes for water rights. Post-1973 water rights are created by the legislature and administered by the DRNC. *See Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 5, 384 Mont. 503, 506, 380 P.3d 771, 774; *Compare e.g. Axtell v. M.S. Consulting*, 1998 MT 64, ¶ 26, 288 Mont. 150, 159, 955 P.2d 1362, 1368 (discussing the pre-1973 water law rules of prior appropriation). The water rights identified in this litigation deal with post-1973 groundwater rights where the water right owner has a well, developed spring, or other groundwater development on their private property. *See* Doc 34, Declaration of Dennis Myer, ¶¶ 13-16.

Pursuant to § 85-2-306, MCA, "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." *Clark Fork Coal*, (explaining post-1973 water rights permits and § 85-2-306, MCA). This statute states that appropriation of post-1973 groundwater rights requires that the person appropriating the groundwater right has "exclusive property rights in the ground water development works." *Id.* Thus, the ownership requirement was already in place for post-1973 water rights before HB 286 was passed. Nothing in the plain language of HB 286 affects the existing requirements of ownership to obtain a permit.

Prior to HB 286, TLMD, which is a division within the DNRC, realized that it had failed to assert an interest in water developed on private property and utilized on State Lands, after the DNRC granted the property owner a permit to develop the water. In 2015, TLMD began to examine school trust land and discovered post-1973 groundwater rights used on trust land, in which the State, the Montana Board of Land Commissioners or TLMD were not listed as owners. Doc 34. ¶ 2. TLMD discovered 141 of these water rights and sent 608 Forms to the DNRC. The ground water rights holders then received an updated abstract from the DNRC that identified the State as a co-owner of the water right. *Id*, ¶¶ 8-9. In essence, TLMD, a division within the DNRC, went across the hall to the Water Resources Division of DNRC, which manages post-1973 water rights, and put the State's name on 141 water rights without providing the water right owners any notice or opportunity to object to the State's claim of ownership. At this time, there was no statutory mechanism for the water right holders to object to TLMD's Form 608 filings with the DNRC.

In response, HB 286 was passed to address TLMD's and DNRC's unilateral claims of ownership and restore a system of due process to legitimate water right holders. Section 3 rescinds the State's claimed ownership made through the filing of the 608 Forms. § 85-2-441(3), MCA.

Section 2 then provides a judicial process for the State to assert ownership in groundwater rights that are from a well, developed spring, or other ground water development located on private land but used on trust land. § 85-2-441(2), MCA. Section (1) clarifies that the process established in HB 286 is for water rights that are developed or diverted on private land but used on school trust land. § 85-2-441(1), MCA.

Appellant, on appeal, now admits that HB 286 does not disperse trust assets or change substantive Montana water law. However, Appellant now argues that HB 286 requires an unconstitutional procedure that burdens the trust. Appellant's Opening Brief p.19. Contrary to Appellant's argument that HB 286 creates a presumption about ownership of water rights that retroactively changes water rights in prejudice to the trust, HB 286 does not change any presumptions or requirements of ownership for post-1973 groundwater rights identified in this litigation. Section 85-2-306 of the Montana Code Annotated already precluded the State from owning a water right when it does not own the property where the well or diversion works is located to appropriate the water right. HB 286, far from changing presumptions of ownership, clarified existing ownership already established by the Montana Legislature, and provided a process to determine ownership of water diverted on private land but used on school

trust land. For post-1973 water rights, the Legislature has authority to "provide for the administration, control, and regulation of water rights." Mont. Const., Art. IX § 3. The Legislature is fully within its authority to adopt HB 286 in order to provide a fair process to administer water rights.

Appellant's statutory construction of HB 286 also fails to harmonize HB 286 with § 85-2-306, MCA. "A presumption exists that the Legislature does not pass meaningless legislation, and accordingly, this Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each." *Oster v. Valley Cnty*., 2006 MT 180, ¶ 17, 333 Mont. 76, 81, 140 P.3d 1079, 1082. Taken together, HB 286 now provides an adjudication process for water right disputes dealing with well water from private lands that is used on school trust land. The District Court correctly summarized the effect of HB 286:

> 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.

Doc. 73, Order on Pending Motions, p. 25. As the District Court aptly points out, HB 286 equally benefits both the State and individual water rights holders by providing clarity and a process for which to adjudicate those water rights secured and developed on private land but used on trust land.

Using proper statutory construction to assume all doubt in favor of HB 286 and examining its plain language, HB 286 does not substantively change Montana water law. HB 286 does not change any ownership principles and does not burden the trust. Instead, HB 286 restores due process and stops the legally deficient process of TLMD unilaterally asserting ownership with no method for the water right holder to object or participate in the process. Therefore, Appellant has not proved beyond a reasonable doubt that HB 286 is unconstitutional.

A. Appellant's Legal Theory and Remedy Violates Water Rights Holders' Due Process Rights

The Montana Constitution recognizes that private property is a fundamental right. Art. II, § 3. When an individual or entity appropriates water, they acquire a distinct property right. *Harrer v. N. Pac. Ry.,* 147

Mont. 130, 134, 410 P.2d 713, 715 (1966). This Court has referred to water rights as property rights of the "highest order." *Id*. As property rights, water rights are protected by due process and require that an owner of a water right be afforded due process. *Little Big Warm Ranch, LLC v. Doll*, 2018 MT 300, ¶ 11, 393 Mont. 435, 431 P.3d 342. Therefore, the owners of the 172 water rights identified in this litigation, including the 141 water rights subject to TLMD's filing of a Form 608 with a point of diversion or well on private property but a place of use on trust land, are all afforded due process under the Montana and Federal Constitutions.

Article II, Section 17 of the Montana Constitution provides, "no person shall be deprived of life, liberty, or property without due process of law." This Court has previously stated, "due process generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action." *Geil v. Missoula Irrigation Dist*., 2002 MT 269, ¶ 53, 312 Mont. 320, 59 P.3d 398, *quoting Pickens v. Shelton-Thompson,* 2000 MT 131, ¶ 13, 300 Mont. 16, 3 P.3d 603. Due process at the very least requires notice and opportunity for a hearing. *City of Missoula v. Mt. Water Co*., 2016 MT 183, ¶ 25, 384 Mont. 193, 378 P.3d 1113.

Similarly, the Fourteenth Amendment to the United States

Constitution also provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755, 125 S. Ct. 2796, 2802 (2005). Accordingly, procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976). As the United States Supreme Court held, some form of hearing is required before an individual is finally deprived of a property interest. *Id*; *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974).

As discussed *supra*, DNRC's decision to act unilaterally as a neutral administrator of post-1973 water rights and simply place its name on 141 water rights without proper notice or a hearing violated the due process rights of the water rights holders/lessees. HB 286 corrected this unconstitutional process and provided due process for the adjudication of post-1973 water rights diverted on private land but used on school trust land.

Although Appellant's legal theories have either changed or evolved throughout the briefing in the District Court and on appeal, implicit in Appellant's legal theory is the identification of 141-172 water rights that are wrongly in exclusive private ownership and should at least be co-titled with

the State. Appellant's Opening Brief, p. 18. The result of finding HB 286 unconstitutional and declaring the State an owner of 141-172 water rights (possibly more), or returning to the former unilateral Form 608 process, would deny legitimate water right holder's due process. As the record indicates, every water right identified in this litigation is a perfected water right. Doc. 34, Dennis Meyer's Declaration, Ex. D. Thus, contrary to Appellant's contention that all of these water rights are vested with the State, each water right as it currently stands is privately owned.

In effect, Appellant is asking this Court to declare that the legitimate water right holders identified or not identified in this lawsuit are not the rightful owners of their groundwater rights, either through the permitting system or the exemption in § 85-2-306, MCA. However, to declare the State the owner of 141-172 water rights, with none of the individual water rights owners present and with no opportunity to be heard, would violate basic due process rights under both the Federal and State Constitutions.

As this Court has recognized, "courts should avoid constitutional issues whenever possible." *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 279, 165 P.3d 1079, 1093. Construing HB 286 under Appellant's legal theory, this Court would invite constitutional due process issues for every water right holder who owns a post-1973

groundwater right that is developed and diverted on private land but used on school trust land. While the management of school trusts lands is important and protected by the Enabling Act and Montana Constitution, *see Montrust I* ¶¶ 15-17*,* water rights holders' property interests and due process rights are equally important and protected by the Montana and Federal Constitutions. When confronted with two competing constitutional interests, this Court has stressed the need to reconcile the competing interests. *See Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987) (balancing the competing constitutional interests of private property rights and the public's interest in water).

HB 286 provides a process for TLMD and the DNRC to manage water rights used on trust land but developed on private property. It balances the need for TLMD to manage trust lands for the benefit of the trust, while protecting the private property and due process rights of legitimate water right holders. This Court should not construe HB 286 as to create conflict between due process rights and the State's trust duties. Appellant's legal theory and proposed remedy is completely silent on private property rights and would invite the Court to sweepingly declare that more than a hundred water right holders in Montana are not the sole owners of their water rights, and that the State may claim ownership by filing of an internal form

without any notice or hearing available to the owners of a protected water rights. Such a result would violate basic due process, and the Court should respect the Legislature's judgment in balancing the management of trust lands and the due process rights of private property owners.

II. HB 286 Does Not Violate the Holding in *Pettibone*

Pettibone is distinguishable from Appellant's facial constitutional challenge to HB 286. Unlike here, *Pettibone* was an appeal from the Montana Water Court's adjudication of pre-1972 water rights in the Powder River Basin. *Dep't of State Lands v. Pettibone,* 216 Mont. 361, 368, 702 P. 2d 948, 952 (1985). In *Pettibone*, all factual issues were resolved and stipulated before the hearing in the Water Court. *Id* at 364. The Water Court's adjudication and appeal to the Montana Supreme Court dealt with 23 water rights, including groundwater wells on school trusts land, developed springs on school trusts land, and surface water rights diverted and used on school trust lands. *Id*, at 365. In its final Order, the Water Court held "that the title to the waters diverted on State school trust lands vests in the lessee, and not the State." *Id* at 364. The State appealed this Order, arguing that the 23 water rights that were diverted, developed, and used on state trust land belonged to the State. *Id*.

On appeal, this Court agreed with the State and found that water

rights that were diverted and developed by private individuals on school trust land were appurtenant to the school trust land and thus owned by the State. *Pettibone*, 216 Mont. at 368. The Court applied the following two rules regarding state trust lands:

> First, an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must receive compensation. Second, 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. (Emphasis added)

Pettibone, 216 Mont. at 371.

Pettibone was about the adjudication of pre-1972 water rights, and as a result of Senate Bill 76 in 1979, these water rights are adjudicated in the Water Court, with the burden of filing for water right claims on the appropriators. *Id*, at 368. As this Court explained in *Pettibone*, all the lessees' claims in *Pettibone* were "use rights," rights based on historic beneficial use, not rights granted by the DNRC through the permitting system or statutory exemptions. *Id*, at 365. This Court held that lessees making appropriations on and for school trusts land were acting on behalf of the State. *Id*, at 368. The key to this holding was that the historic water rights were appurtenant to the trust land, thus the water rights ran with the land, not to the individual lessees. *Id*, at 372.

In contrast to *Pettibone*, the situation here does not arise from adjudication of pre-1972 water rights. Instead, the water rights identified in this litigation are all post-1973 ground water rights appropriated under § 85-2-306, MCA or through the permitting system with the DNRC. *See* Doc 34, Dennis Myer's Declaration. In addition, every water right identified in Ex. D of Dennis Myer's Declaration, which Appellant relies on, states that all of the identified water rights are developed or diverted on private land, not on trust land like in *Pettibone*. Nothing in *Pettibone* holds that post-1973 ground water rights, appropriated pursuant to § 85-2-306, MCA, by diversions and developments on private property, automatically vest with the State or that no process should be available.

Appellant contends that *Pettibone* did not distinguish between surface and ground water rights, and that the location of the initial point of diversion or development works is irrelevant under the *Pettibone* analysis. *See* Appellant's Opening Brief, p. 16-18. However, Appellant fails to distinguish between existing pre-1972 water rights and post-1973 water rights. While *Pettibone* included groundwater rights, all the water rights adjudicated in *Pettibone* were pre-1972 water rights, which make no distinction between groundwater or surface water rights. *Pettibone*, 216 Mont. at 376. However, Montana law and *Pettibone* do distinguish between

pre-1972 and post-1973 water rights.

Montana's Constitution, adopted in 1972, "provides that 'all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.'" *Id*, at 375; *quoting* Mont. Const. Art. IX, sec. 3(1). As this Court explained, the State in *Pettibone* was claiming already "existing" water rights that existed prior to 1972. *Id*; *see also* § 3-7-501, MCA; *In re Dep't of Nat. Res. & Conservation*, 226 Mont. 221, 228, 740 P.2d 1096, 1100 (1987) (explaining jurisdiction and function of the Water Court). Post-1973 water rights, which are rights arising after July 1, 1973, fall outside the jurisdiction of the Water Court and are administered by the DNRC. § 85-2-302, MCA; *see Clark Fork Coal.* ¶¶ 5-7 (explaining post-1973 water right permits and exceptions). As discussed *supra*, groundwater appropriations are generally exempted from the permitting process, and are only available to "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." § 85-2-306(1)(a), MCA.

Unlike *Pettibone*, it is undisputed that the majority of the water rights identified in this litigation, which Appellant contends are subject to *Pettibone*, are exempted groundwater rights pursuant to § 85-2-306, MCA.

Appellant's Opening Brief p. 5; Doc 34, Declaration of Dennis Myer Ex. D. Appellant's contention that the point of diversion is not legally consequential, and that post-1973 groundwater rights diverted or developed on private lands apply equally to *Pettibone* as pre-1972 water rights, is in direct contravention to § 85-2-306, MCA. The point of diversion and ownership of the land where the groundwater works are located is a requirement for ownership of a post-1973 groundwater right. *Id*. Moreover, *Pettibone* was explicitly only applied to pre-1972 water rights that were diverted or developed on school trust land and put to beneficial use on school trust land. *See Pettibone* 216 Mont. at 376. The appropriated rights in *Pettibone*, under the general rules of prior appropriation for "existing" water rights, were appurtenant to the school trust lands and thus belonged to the State. *Id*, at 372.

Pettibone does not automatically become applicable simply because state land is involved. In Montana Water Court Case 43A-A (June 29, 2000), the state land division of DNRC sought ownership of water rights owned by the Kunnemann family, which had been developed off state land but later used on state land during the term of a state lease. The Water Court rejected DNRC's attempt to use *Pettibone* in order to take Kunnemann's water rights, stating:

> Just as it would make no sense to allow each succeeding tenant to appropriate and "walk off' with one water right after another diverted and developed on and for, and appurtenant to, school trust land, it would make no sense to allow the State to "take" one vested right after another from unsuspecting lessees who merely intend to apply their vested water rights for temporary use on school trust land. While school trust land may temporarily benefit from a lessee's private water right, TLMD is not entitled therefore to convert that fortuitous effect into a permanent asset of the trust estate. *While the State's fiduciary role as charitable trustee clearly prohibits it from surrendering interests of the trust estate without receiving full market value, a private existing water right such as this right was never an "interest" of the trust estate to begin with and should not be considered part of its value.*

Shields River Basin, 2000 Mont. Water LEXIS 1, *45-46, 2000 ML 5999 (emphasis added). Similarly, *Pettibone* does not apply here because this case is not about adjudication of water rights on state trust lands--the water rights at issue are existing private rights.

In this case, the groundwater is not diverted on State lands; the point of diversion and place of development is on the adjacent private property and is being used on state trust lands leased by the water owner. Nothing in *Pettibone* says that post-1973 groundwater rights with wells on private land automatically vest with the State. Therefore, Appellant's legal theory of *Pettibone* does not apply to the water rights associated with HB 286. Appellant's claim fails as a matter of law, and their Motion for Summary Judgment should be denied.

A. Pettibone Provided Due Process

In *Pettibone*, the State participated in the water rights adjudication and objected to lessees' claimed ownership of pre-1972 water rights. As this Court noted:

> Art. IX, sec. 3(1), provides that "all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." This provision prevents the State from affecting rights vested at the time the Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Here the State, through the adjudication process, is claiming, and this Court is recognizing rights "existing" at the time the 1972 Constitution was adopted -- Art. IX, sec. 3(1) merely reaffirms these rights.

Pettibone 216 Mont. at 375-76. Therefore, this Court expressly acknowledged in *Pettibone* that, for the State to acquire ownership in pre-1972 "existing" water rights, the State either had to go through a process (such as the adjudication in the water court) or the State had to use express powers such as eminent domain. Thus, *Pettibone* concerned conflicting claims to ownership of a water right, not the filing of Form 608 with the DNRC to unilaterally claim ownership in water rights without any hearing or a chance for the water right holders to object. Furthermore, *Pettibone* arose out of an appeal from the Water Court's adjudication of individual water rights with the lessees' participation, not a facial constitutional

challenge where none of the water right holders or lessees participated.

Appellant's facial challenge, relying on *Pettibone*, claims that HB 286's process of the State having to go to court and undergo a process to get a decree for individual post-1973 groundwater rights diverted or developed on private land places an undue burden on the State, as the trustee, to manage school trust lands. Appellant's Opening Brief p.20-21. However, the State, as the trustee of school trusts lands, has always had to engage and participate in the adjudication of water rights, as occurred in *Pettibone*. In fact, TLMD continues in the Water Court to pursue pre-1972 water rights claims in Water Court. *See*, e.g., *Lybeck v. State Bd. of Land Comm'rs, Case* No. 40G-0021-R-2020, 2020 Mont. Water LEXIS 484 (Mont. Water Ct. Aug. 14, 2020); *Hanson v. State Bd. of Land Comm'rs, Case No*. 40G-0071-R-2020, 2020 Mont. Water LEXIS 468 (Mont. Water Ct. Aug. 12, 2020).

Rather than HB 286 violating *Pettibone*, HB 286 provides a process for water rights where the point of diversion is on private property and the place of use is on adjacent school trusts lands. § 85-2-441(2), MCA. HB 286 provides no greater burden than TLMD's current charge of objecting to a water right before the Water Court based on *Pettibone*. Surely, Appellant cannot contend that pre-1972 water rights are more deserving of due process than post-1973 groundwater rights. The District Court also noted

how HB 286 mirrors the due process afforded in *Pettibone*:

> 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.

Doc 73, Order on Pending Motions p. 24.

Similar to Appellant's *Pettibone* argument that HB 286 imposes an unconstitutional procedure, Appellant also cites *Jerke v. State Dep't of Lands*, 182 Mont. 294, 597 P.2d 49 (1979). In *Jerke*, a grazing district, as a lessee of trust lands, was granted a preference right, which granted the grazing district "the preference right to lease the land covered by his former lease by meeting the highest bid made by any other applicant." *Id.* at 295. This Court found that the grazing district in that matter, as holder of this preference right, "does not even use the land; it cannot use good agricultural practices or make improvements thereon. Likewise, the actual user of the land, who as a member of the Grazing District is prevented from bidding on the lease, is not motivated to further the policy of sustained yield." *Id.* at 297. This Court narrowly found that to allow the preference right to be exercised by the grazing district "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," and that "the only way for the trust to receive full market value was by pure competitive bidding." *Id.*

HB 286 does not provide any preference to the individual water right holder, in prejudice to the State. Unlike in *Jerke*, HB 286 does not turn water rights holders into the trustee, it merely provides a process for the State to assert ownership for groundwater rights diverted or developed on private property. HB 286 did not give away "presumptive" water rights or impose an undue burden on the State's management of trusts land. The water rights in HB 286 are existing perfected property rights. Just like *Pettibone*, HB 286 provides a process for the State to assert ownership in water rights.

The State has always had to participate in some form of adjudication or voluntary negotiation to acquire ownership in water rights. HB 286 requires the State to do what it did in *Pettibone* and continues to do in the adjudication of pre-1972 water rights before the Montana Water Court. Therefore, HB 286 provides due process and follows *Pettibone* in providing a process to challenge ownership of post-1973 groundwater rights.

B. Even if Pettibone Applied, Appellant Would Have to Prove Each Individual Water Right Is Appurtenant to Trust Lands.

Pettibone explicitly held that "water that is appurtenant to the school lands is an interest for which the trust must receive compensation."

Pettibone, 216 Mont. at 371. Appellant instead summarizes *Pettibone*'s holding as the following: "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." Appellant's Opening Brief p. 13. However, Appellant provides no citation to *Pettibone* for this statement because that is not what *Pettibone* held. The finding of appurtenance was central to the holding of *Pettibone* as this Court stated, "appurtenant water right is an interest in the land (citations omitted) it cannot be surrendered by the State without the trust receiving fair market value." *Pettibone*, 216 Mont. at 374. Thus, a finding of appurtenance is a prerequisite for the application of *Pettibone*.

The Water Court has made a similar conclusion that the State's fiduciary role does not empower it to "take" water applied to state lands unless that water has been made appurtenant to the state lands. *Shields River Basin*, 2000 Mont. Water LEXIS 1, *44, 2000 ML 5999. As the Water Courted stated:

> Under Montana law, where the owner of a water right also owns the land on which the water is put to beneficial use, the water right is usually deemed to be incidental or appurtenant to the land and remains appurtenant thereto until severed from the land by the owner of the water right. Section 70-15-105, MCA. See discussion, infra, at pp. 16-18. Therefore, the Pettibone Court deemed the 23 water rights at issue to be appurtenant to the school trust land

Id, at 24.

The determination of whether water is appurtenant to the land is one of fact. *Pettibone* 216 Mont. at 361. "Generally, a water right does not become an appurtenance to land titled in another, until: (1) the appropriator obtains title to the land; (2) the water right is conveyed to the owner of the land, or (3) the facts and circumstances indicate that the appropriator intended to make the right appurtenant to the land." *In re Adjudication of the Existing Rights to the Use of All Water*, 2005 Mont. Water LEXIS 1, *12. Therefore, even under Appellant's legal theory of HB 286 and *Pettibone*, Appellant would have to prove that each of the 141-172 water rights identified are, in fact, appurtenant to the school trust land.

Appellant has not provided any evidence regarding which water rights are allegedly appurtenant to trust lands. Thus, Appellant cannot meet its burden on summary judgment with no material facts establishing that the water rights at issue are appurtenant to the trust lands. Appellant's facial challenge must fail on summary judgment because, "If any facial challenge requires a case-by-case analysis, summary judgment is improper because it raises genuine issues of material fact." *Mont. Cannabis Indus. Ass'n.* ¶ 73.

Appellant seems to suggest that in *Pettibone,* the 23 rights at issue were assumed appurtenant, and that anytime water is used on school trust

land it is appurtenant. *See* Appellant's Opening Brief p. 17. However, this Court specifically noted in *Pettibone* that "All of the factual disputes, as to flow, source and place of diversion and place of use were resolved prior to the hearing on the State objection held November 24, 1982. The hearing was confined solely to the following question of law." *Pettibone* 184 Mont. 364.

In fact, some of the Water Rights listed and identified in Dennis Myer's water rights spreadsheet show several water rights that were initially perfected off State trust land by several of the Plaintiffs. Doc. 34, Ex. D-006 to -020 (several water rights state "no" under the column "[w]as a State [place of use] on Original Filing"). Appellant has previously admitted that water rights developed, diverted, and perfected on private land, then later used on trust land, are exempt from *Pettibone*. Doc. 42, Plaintiffs' Brief in Opposition to "State of Montana's Motion for Summary Judgment" p. 18. Even under Appellant's reading of *Pettibone,* some of these water rights listed are exempt from *Pettibone*, and those water rights under HB 286 pose no constitutional issue. This alone defeats Appellant's facial challenge in which Appellant must prove that "no set of circumstances exists under which the [challenged legislation] would be valid." *Mont. Cannabis Indus. Ass'n.* ¶ 73. Therefore, Appellant's facial

challenge to HB 286 fails as a matter of law, and this Court should uphold the District Court and deny Appellant's Summary Judgment Motion.

III. The District Court Correctly Held That Appellant's Constitutional Challenge to HB 286 was Not Ripe and Thus Nonjusticiable

Appellant, in its Opening Brief, does not address the District Court's finding that their constitutional claim was unripe and never conducted a ripeness analysis. However, before Appellant may argue the merits of its claims, they must satisfy the justiciability requirements of the Montana Constitution and this Court's prudential limitations on judicial power. *See Reichert*, ¶ 53. "Justiciability is a threshold determination for all actions" *City of Missoula v. Fox*, 2019 MT 250, ¶ 11, 397 Mont. 388, 393, 450 P.3d 898, 902. Thus, "the judicial power of Montana's courts is limited to 'justiciable controversies.'" *Reichert*, ¶ 53. A justiciable controversy is one that is:

> definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.

Id; *citing Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948).

One of the central concepts in justiciability requirements is the

doctrine of ripeness. *Id*, ¶ 54. Ripeness is concerned with "whether the case presents an 'actual, present' controversy." *Id*. The ripeness requirement is meant to prevent courts from ruling on abstract disagreements or premature litigation, and a case is unripe "when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts". *Id*. In other words, "ripeness 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…" *Id*, ¶ 55.

Ripeness contains a constitutional component and a prudential component. "The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to standing." *Id*, ¶ 56. Prudential ripeness "involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id*. The primary focus in this inquiry is whether there is an adequate factual record to render a judicial decision. *Id*. In this matter, the District Court found that Appellant's facial constitutional challenge was unripe under both the constitutional and prudential components. *See* Doc. 73, Order on Pending Motions p. 18-20.

A. Nothing in HB 286's Plain Language Violates the State Trust Duties to Trust Lands

Appellant has made a facial challenge alleging that the passage of HB

286 violates school trusts principles. The State of Montana, as the trustee of school trust land, has constitutional limits on how the State manages or disposes of trust lands. *Montrust I*, ¶ 14. "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* 216 Mont. at 371. Thus, Appellant must show that the plain language of HB 286, on its face, with all presumptions in favor of the statute, violates school trust principles. *Montrust I*, ¶ 11.

As discussed *supra*, the plain language of HB 286 is procedural and requires a process for the State to obtain ownership of private parties' water rights. Nothing in the language of HB 286, on its face, impairs the State's management duties to ensure trust lands are not devalued. Any finding that HB 286, on its face, devalues school trust lands based on the mere passage and plain language of the statute is entirely speculative. Thus, to rule on Appellant's facial challenge would require this Court or the District Court below to issue a hypothetical ruling. As the District Court succinctly held:

> 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

Id. Therefore, Appellant's facial challenge is constitutionally unripe because the plain language of HB 286 does not reveal any sufficient injury to the school trusts lands.

The factual record provided by Appellant is also deficient. Appellant has identified 172 water rights, all of which they allege belong to the State. *See* Complaint, ¶ 17; Doc. 34 Declaration of Dennis Myer, Ex. D-006 to -020. Appellant's primary contention is that this Court's decision in *Pettibone* requires that all developed groundwater water rights used on school trust lands belong to the State and that HB 286 violates this requirement. Appellant's Opening Brief p. 13. Putting aside the merits of Appellant's allegations (which Intervenors strongly dispute *see* Section I & II), Appellant has provided no evidence how HB 286 devalues trust lands and has not identified which individual rights were affected by HB 286.

For example, as discussed *supra,* the 172 water rights identified by Appellant are not all the same. Many of the groundwater rights are post-1973 rights appropriated pursuant to § 85-2-306, MCA and perfected on state trust lands. However, as Dennis Myer's spreadsheet

shows, several water rights were initially perfected off State trust land by several of the Plaintiffs before they were put to use on trust land. Doc. 34, Ex. D-006 to -020 (several water rights state "no" under the column "[w]as a State [place of use] on Original Filing"). Appellant has previously admitted that water rights developed, diverted, and perfected on private land, then later used on trust land, are exempt from *Pettibone*. Doc. 42, Plaintiffs' Brief in Opposition to "State of Montana's Motion for Summary Judgment" p. 18. Not only does this defeat Appellant's Summary Judgment Motion, but it also highlights that there is not a sufficient record to show which water rights apply to HB 286, and that application of HB 286 to certain water rights violates school trust principles. In addressing Appellant's contentions, this Court would be forced to issue a speculative or advisory opinion.

Lastly, Appellant's reliance on *Pettibone* and *Jerke* to argue that their claims are ripe and that no additional factual record is necessary for their claims actually undermines Appellant's position. Appellant's Opening Brief p. 14-15. In *Pettibone,* individual water rights were being adjudicated and all material facts were decided or stipulated to. *Pettibone* 216 Mont. at 364. Likewise, in *Jerke*, the constitutional challenge was limited to a specific lease and transaction: "we limit our

decision to the facts of this case and hold the preference statute to have been unconstitutionally applied." *Jerke* 182 Mont. at 296. Therefore, this Court in both of those cases did not make *ipso facto* findings. Both *Pettibone* and *Jerke* were applied to specific controversies. Unlike *Pettibone* or *Jerke*, Appellant's facial claim does not arise from any specific facts or adjudication. Appellant made a claim without identifying how specific individual water rights affect trust land and provides no evidence that HB 286 actually devalues trust lands.

Here, a case-by-case analysis of which water rights allegedly are affected by HB 286, and how HB 286 applied to each water right devalues school trust land is required for Appellant's legal claims and bars the granting of their Summary Judgment Motion. Likewise, the factual record is deficient for any meaningful judicial review violating the prudential consideration in ripeness. As the District Court held:

> There is simply an inadequate factual record "upon which to base effective review." *Id.* (citing *Reichert* ¶ 55) (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.

Doc. 73, Order on Pending Motions p.19. Therefore, given the plain language of HB 286 and the lacking factual record, Appellant cannot meet its burden for a facial constitutional challenge and their claim is unripe for judicial

review. This Court should uphold the District Court, granting the State's Summary Judgement Motion.

IV. The District Court Properly Denied Appellant's Motion to Amend

Pursuant to M.R.Civ.P 15(b), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." While the rule favors allowing amendments, that does not mean that a court must automatically grant a motion to amend. *Stundal v. Stundal*, 2000 MT 21, ¶ 13, 298 Mont. 141, 144, 995 P.2d 420, 422. Leave to amend is properly denied "when the amendment is futile or legally insufficient to support the requested relief." *Hickey v. Baker Sch. Dist. No. 12*, 2002 MT 322, ¶ 33, 313 Mont. 162, 170, 60 P.3d 966, 972. Claims that are legally deficient, such as claims that lack standing, *see Id*, or claims barred by immunity, are futile. *See Mogan v. Harlem, 238* Mont. 1, 8, 775 P.2d 686, 690 (1989). Further, an amendment is futile when the proposed amendment fails to state a claim pursuant to M. R. Civ. P. 12(b)(6). *See Deschamps v. Treasure State Trailer Court, Ltd.,* 2010 MT 74, ¶ 22, 356 Mont. 1, 7, 230 P.3d 800, 804 (Denying an amendment seeking a claim for declaratory judgment that did not state a proper claim for declaratory relief).

Appellant filed a Motion to Amend their Complaint to add "as

applied" challenges and attorney fees against Intervenors. The District Court found that Appellant's "as applied" amendments did not allege any additional facts to fix the deficiency of the factual record. Doc. 73, Order on Pending Motions p. 27. As the District Court held, "Plaintiffs 'as applied' challenges do not fix the ripeness issues with their claims and are futile." *Id.* In addition to the District Court's reasoning, Appellant's two proposed amendments to add "as applied" challenge to 164 water rights and an "as applied" challenge to HB 286 and § 85-2-306(1), MCA, are both futile for the very same reasons the facial challenge to HB 286 fails. As discussed, *supra*, Appellant's "as applied" challenges still rely on a legal theory that violates due process and mischaracterizes *Pettibone*.

A. Attorney Fees Are Not Available Against Intervenors

Appellant's last amendment concerns a claim for attorney fees exclusively against Intervenors, alleging that Interventions are the real party in interest. First Amended Complaint, ¶¶ 41-42. Appellant's amendment is incorrect as a matter of law and is futile. First, Intervenors are not the "real party in interest." The real party in interest is "a party who, by the substantive law, has the right sought to be enforced." *First Sec. Bank v. Ranch Recovery Ltd. Liab. Co.*, 1999 MT 43, ¶ 29, 293 Mont. 363, 371, 976 P.2d 956, 961. Here, Appellant is the "real party in interest" who is trying to enforce an

alleged constitutional violation against the State as trustee of school trust lands. The State is the defendant against whom judgment is sought, and Intervenors only sought intervention to ensure that their constitutional private property rights are adequately represented and defended.

Appellant's factual allegations that Intervenors were supporters of HB 286 is irrelevant to whether Intervenors are the "real party in interest." As this Court has stated, legislative arguments are not the business of the courts. *Marbut v. Sec'y of State*, 231 Mont. 131, 136, 752 P.2d 148, 151 (1988). In *Marbut*, the Supreme Court dismissed an action regarding ballot issues against the Secretary of State for lack of a justiciable controversy *Id.* In response, the Secretary, who wanted the case heard, sought to have the intervenor be named the party defendant and real party in interest. *Id.* This Court denied the request stating, "The cause would then be reduced to an argument between Mr. Marbut and the Intervenor as to the validity of the Secretary's actions." *Marbut*, 231 Mont. at 136. The same applies here: Appellant's trust theory and remedy sought is about legislation and the State's duties as a trustee. The State is the party defendant. If the Intervenors are the "real party in interest" and "party defendant," then this case would be reduced to an argument between Appellant and Intervenors about HB 286. Therefore, Intervenors are not the "real party in interest" in this matter, and

no theory of attorney fees applies.

In addition, Montana follows the American rule that parties are generally not entitled to attorney fees absent specific contractual or statutory provision. *Mt. W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 13, 308 Mont. 29, 33, 38 P.3d 825, 828. Appellant's theory of attorney fees under general trust principles is not applicable to Intervenors. Montana has codified attorney fees in trust relationships in the Montana Uniform Trust Code. § 72-38-101, MCA. Pursuant to the statute, trustees may be liable for attorney fees. *See* § 72-38-1004. Under both Montana law and Appellant's own theory of the case, the State of Montana is the Trustee of trust lands, not the Intervenors. *See Pettibone*, 216 Mont. 361. Therefore, even if this Court reverses the District Court and grants Appellant's applied challenges, Appellant's claim for attorney fees against Intervenors fails as a matter of law and is futile.

CONCLUSION

Appellant's facial challenge to HB 286 fails as a matter law. The plain language of HB 286 provides constitutionally protected due process to water rights and does not substantively change Montana water law. Moreover, *Pettibone* arose from an adjudication in the Water Court, not established post-1973 groundwater rights diverted or developed on private land and is

inapplicable. Appellant has also not met its burden of proof that HB 286, under any set of factual circumstances, violates the Montana Constitution. Lastly, the District Court properly held that the Appellants claims were unripe. Appellant's Proposed Amended Complaint does not cure these legal deficiencies. Therefore, this Court should deny Appellant's Summary Judgment and affirm the District Court's granting of the State's Summary Judgment.

DATED this 15th day of November, 2021.

By: _____
Hertha L. Lund
Attorney for Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionately spaced Georgia text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 15th day of November, 2021.

By: _____
Hertha L. Lund
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CERTIFICATE OF SERVICE

I, Hertha Louise Lund, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 11-15-2021:

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