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

ADVOCATES FOR SCHOOL TRUST LANDS,

Plaintiffs 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 IRRIGATORS,

Intervenors and Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, The Honorable Michael F. McMahon, Presiding

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STATEMENT OF ISSUES

1. Did Plaintiff-Appellant Advocates for School Trust Lands' ("ASTL") waive its ability to challenge the district court's order by failing to identify the district court's ripeness determination as an issue presented for review?

2. Did the district court correctly conclude ASTL's constitutional claims challenging House Bill 286 ("HB 286"), codified at MCA § 85-2-441, are not ripe?

3. Does HB 286 dispose of State trust assets or impede managerial prerogatives in violation of the State's trust land duties?

4. Did the district court correctly conclude that neither party had alleged a disputed material fact and grant the Defendant-Appellee State of Montana's ("State" or "Montana") motion for summary judgment?

5. Did the district court abuse its discretion when it denied ASTL's motion to amend its complaint as futile?

STATEMENT OF THE CASE

On September 6, 2019, ASTL filed its original complaint. Doc. 1. The State and ASTL filed a joint preliminary injunction enjoining HB 286 while litigation was pending before the district court, Doc. 5, which the district court granted, Doc. 7.

Shortly thereafter, the district court granted intervention to Montana Farm Bureau Federation, Montana Stockgrowers Association, and the Association of Gallatin Agricultural Irrigators (collectively, "MFBF"), Doc. 14, and granted Rural Montana Foundation's ("RMF") unopposed motion for leave to file an amicus brief, Doc. 23.

Over the course of a year, ASTL propounded discovery on the State and MFBF. Doc. 42 at 2; Doc. 50 at 2.

On October 22, 2020, ASTL filed a motion for leave to file an amended complaint. Doc. 25. ASTL's proposed amended complaint inserted "as applied" into several constitutional allegations concerning HB 286, and included a new as applied challenge to MCA § 85-2-306(1). Doc. 36 at 3–4 (providing a summary of ASTL's proposed amendments). Both the State and MFBF filed briefs in opposition to ASTL's motion for leave to amend its complaint. Docs. 36 & 40.

On October 30, 2020, the State filed a motion for summary judgment, asserting that ASTL's original complaint lacked standing and the claims asserted therein were not ripe. Doc. 28. On December 15, 2021, ASTL filed a cross motion for summary judgment limited to the facial challenges contained in its original complaint. Doc. 50 at 2.

Montana and MFBF filed briefs in opposition to ASTL's motion for summary judgment, Docs. 63 & 58, and RMF filed an amicus brief urging the district court to uphold the constitutionality of HB 286, Doc. 63.

On April 12, 2021, the district court held oral argument on the pending motions, with counsel for Montana and ASTL appearing. Doc. 72. On the same day, the district court: (1) granted the State's motion for summary judgment, dismissing ASTL's claims as unripe; (2) denied ASTL's motion for summary judgment; and (3) denied ASTL's motion to amend its complaint, on the basis of futility. Doc. 73 at 26–27. In the same order, the district court dismissed, vacated, and quashed the stipulated preliminary injunction entered at the beginning of the litigation. *Id.* at 27.

On June 21, 2021, ASTL appealed the district court's order. Doc. 77.

STATEMENT OF FACTS

I. Water rights impacted by HB 286.

HB 286 provides a path by which the State can pursue an ownership interest in ground water rights that have a point of diversion on private property, but which are either partially or wholly used on

State trust land during the course of a land lease. MCA § 85-2-441(1). For example, imagine a rancher who drills a well on their private property for stockwater. *See Hearing on HB 286 before the Mont. H. Comm. on Nat. Resources*, 66th Reg. Sess. 15:34:18–15:35:05 (Feb. 13, 2019) ("House Hearing").[1] Several years after appropriating this water, the rancher leases adjacent State trust land and moves a stock tank, fed by the private well, onto the State trust land. MCA § 85-2-441(1). HB 286 provides that to obtain an ownership interest, the State must either obtain a deed from the rancher transferring an ownership interest, or seek a declaration of ownership from a court of competent jurisdiction.

II. Events leading to the passage of HB 286.

Beginning in late 2015, the Department of Natural Resources and Conservation ("DNRC") Trust Lands Management Division ("TLMD")[2] discovered numerous post-1973 ground water rights with a point of diversion on private land and a place of use on State trust lands, for

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[1] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34914?startposition=20190213153418&mediaEndTime=20190213153505&viewMode=3&globalStreamId=4

[2] TLMD "is responsible for managing the surface and mineral resources of forested, grazing, agricultural, and other classified state trust lands to produce revenue for the benefit of state public schools and other endowed institutions." Mont. Admin. R. 36.1.101(3)(d) (2020).

which the State was not listed as an owner. Doc. 30 ¶ 2. TLMD discovered 141[3] water rights that fit these criteria. *Id.* ¶ 13. By comparison, prior to TLMD's 2015 discovery, the State was listed as an owner or co-owner of 28 ground water rights with a point of diversion on private land and a place of use on State trust lands. *Id.* ¶ 15

Believing that the State should be listed as a co-owner on all of these water rights, TLMD sent out letters to the water right owners of record, informing them that the State would be added as a co-owner on each water right. *Id.* ¶¶ 5–6. TLMD then sent Form 608 Water Right Ownership Updates ("Form 608") to the DNRC Water Rights Bureau[4] to trigger this ownership change. Doc 30 ¶¶ 2–3, 9.

The DNRC's Form 608, however, does not contemplate partial, unilateral, or involuntary transfers of water right interests. *See* Doc. 47 at Ex. H-002. Instead, Form 608 is intended to transfer entire water rights between willing sellers and buyers. The form's instructions state,

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[3] After the passage of HB 286, TLMD staff discovered that an additional three water rights fit these criteria. Doc. 25 ¶ 14.

[4] The Water Rights Bureau "assures the orderly appropriation and beneficial use of Montana's waters through administration of the Montana Water Use Act, Title 85, Chapter 2, MCA." Mont. Admin. R. 36.1.101(3)(e)(v) (2020).

> Did the buyer receive 100% of the seller's interest in the water rights shown above? If no, do not complete this form. You must complete form 641 DNRC Ownership Update Divided Interest.

Id. (emphasis in original).) The instructions also state,

> If all sellers' signatures are not available, attach a copy of the recorded instrument showing conveyance of the property from the seller to the buyer.

Id.

TLMD ignored these instructions and wrote in pen: "NA. No Sale. Correcting ownership by adding [Montana State Board of Land Commissioners] as co-owner." *Id.* TLMD also ignored the field for providing the date of land transfer and wrote, "No sale, just getting Trust lands added as co-owner. Pettibone applies." 47. While the filings failed to conform with the instructions or purpose of Form 608, the DNRC Water Rights Bureau accepted TLMD's filings and updated water right abstracts to list the State as an owner, in addition to the private water right holder. Doc. 30 at Ex. C-004.

None of DNRC's forms contemplate involuntary transfers of water rights. *See* DNRC Water Rights, http://dnrc.mt.gov/divisions/water/water-rights/water-right-forms (last accessed Nov. 3, 2021). Form 608 allows for the voluntary transfer of undivided interests in water rights.

Id. Form 641 provides for voluntary transfer of divided interests in water rights. *Id.*; *see also* Mont. Admin. R. 36.12.102 (2013) (listing DNRC's water forms).

The recipients of TLMD's Form 608 had no opportunity to object or challenge TLMD's ownership assertions. *Hearing on HB 286 before the Mont. S. Comm. on Nat. Resources*, 66th Reg. Sess., 16:23:02–16:23:19 (Mar. 18, 2019) ("Senate Hearing").[5] When asked what recourse these individuals would have to oppose the State's unilateral action, a former DNRC director stated, "you can take us to court." *Id.*

In many instances, adding the State as a co-owner to the water right came decades after water right appropriation. Water Right 40J 1349-00, for example, has a priority date of January 17, 1974 and sat, unclaimed by the State, for 44 years before TLMD attempted to assert an ownership interest. *Compare* Doc. 30, Ex. D-009 *with* Doc. 45, Ex. H-002 (on July 9, 2018, TLMD filed Form 608 on the same water right).

[5] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34020?startposition=20190318162302&mediaEndTime=20190318162330&viewMode=3&globalStreamId=5

III. Passage of HB 286.

After TLMD notified the subject water right holders that they had lost exclusive ownership of their water rights, many members of irrigation and agricultural organizations expressed concern to their organizations' leadership. *See* Senate Hearing at 15:25:45–15:26:40, 15:47:18–15:48:05.[6] These proponents of HB 286 were principally concerned that DNRC had unilaterally asserted State ownership of private water rights without any formal procedure. *Id*.

Other proponents of HB 286 also noted that by asserting an interest in water rights diverted on private land, TLMD created a disincentive for adjacent property owners to apply water rights on leased State trust lands. *See* Senate Hearing at 15:33:46–15:35:05 (a Montana Farm Bureau Federation representative stated that absent the protections provided in HB 286, she would not recommend members use their private water rights on State land leases).[7]

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[6] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34020?startposition=20190318152540&mediaEndTime=20190318154805&viewMode=3&globalStreamId=5

[7] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34020?startposition=20190318153346&mediaEndTime=20190318153505&viewMode=3&globalStreamId=5

HB 286 passed the Senate on third reading 42 to 7, Doc. 29 ¶ 8, Ex. E, and the House on third reading 90 to 9 with bipartisan support, *id.* ¶ 9, Ex. F. The bill became effective on May 11, 2019. *See* 2019 Mont. Laws 1790, ch. 432 § 3.

In its enactment, HB 286 creates a process by which the State may properly obtain an ownership interest in certain private ground water rights by two means: (1) a court of competent jurisdiction declaring the State's ownership interest, or (2) the State obtaining a written deed from the water right holder. MCA § 85-3-441(2). Additionally, HB 286 requires the State to remove its name from water rights for which it had been unilaterally added through Form 608. *See id.* at (3).

STANDARD OF REVIEW

I. Summary Judgment

This Court reviews summary judgment rulings *de novo*, applying the standards set forth in M. R. Civ. P. 56(c)(3). *Bird v. Cascade Cty*, 2016 MT 345, ¶ 9, 386 Mont. 69, 386 P.3d 602; *see also City of Missoula v. Fox*, 2019 MT 250, ¶ 7, 397 Mont. 388, 450 P.3d 898 ("Issues of justiciability … are questions of law, for which our review is de novo."). Summary judgment is appropriate when the moving party demonstrates

both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Bird*, ¶ 9. Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact. *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 19, 330 Mont. 48, 125 P.3d 1121.

II. Amendment of Pleadings

A district court's denial of a motion to amend pleadings is reviewed for an abuse of discretion. *Moody's Mkt., Inc. v. Mont. State Fund*, 2020 MT 217, ¶ 11, 401 Mont. 168, 471 P.3d 68. A district court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. *Id.* .

SUMMARY OF THE ARGUMENT

The district court granted the State's motion for summary judgment because ASTL's claims are unripe. In particular, the district court found that ASTL did not provide sufficient facts for the court to hear its constitutional challenge to HB 286. Doc. 73 at 19–24. The

district court also noted that HB 286 is procedural in nature, and that there will be future opportunity to address State trust obligations as they pertain to individual water rights impacted by HB 286. *Id.* at 24–25.

The district court's decision reflects this Court's determination in *Montana Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985) ("*Pettibone*"), which considered 23 water rights with a factual record developed before the Montana Water Court. This Court's decision in *Pettibone* occurred in an adjudicative setting, much like the process required by HB 286. Because HB 286 mirrors the process afforded to water right claimants in *Pettibone*, attempting to evaluate whether HB 286 upholds State trust obligations before allowing this process to occur would be premature, rendering ASTL's claims unripe.

On appeal, ASTL ignores the district court's ripeness analysis and moves immediately to whether HB 286 is constitutional on the merits. Because ASTL's arguments ignore the necessary threshold question of justiciability, this Court should reject its arguments.

Even if the merits of ASTL's claims were at issue, HB 286 is still constitutional because it (1) does not dispose of State assets for less than fair market value and (2) does not impede the State's managerial

prerogative over its trust assets. *See Pettibone*, 216 Mont. at 371, 702 P.2d at 954.

Finally, the district court did not abuse its discretion when it denied ASTL's motion to amend its complaint as futile.

Accordingly, this Court should affirm the district court's order granting the State's motion for summary judgment, denying ASTL's motion for summary judgment, and denying ASTL's motion to amend its complaint.

ARGUMENT

I. The legal underpinnings of water rights and State trust lands.

Enacted in 1973, the Montana Water Use Act ("WUA") established Montana's current system of water rights administration. *See* MCA §§ 85-2-101 to -441. Under the WUA, water rights appropriated prior to July 1, 1973, otherwise known as "existing rights," are adjudicated by the Montana Water Court "under the law as it existed prior to July 1, 1973." *Id.* § 85-2-102(13); *see also Hoon v. Murphy*, 2020 MT 50, ¶ 33, 399 Mont. 110, 460 P.3d 849 (describing the applicable law to pre-1973 water rights). Water rights appropriated or changed after July 1, 1973, are subject to the DNRC Water Right Bureau's permitting process in

accordance with statutes promulgated by the Montana Legislature. MCA § 85-2-301(1); *see also Clark Fork Coal v. Tubbs*, 2016 MT 229, ¶¶ 5–8, 384 Mont. 503, 380 P.3d 771 (describing the permit system applicable to post-1973 water rights).

In 1984, the Montana Water Court was in the process of adjudicating pre-1973 water rights for the Powder River Basin. *See Pettibone*, 216 Mont. at 364, 702 P.2d at 950. Prior to issuance of the final decree in that basin, the Montana Department of State Lands ("DSL")—the predecessor to TLMD—filed a objections and asserted that title to the water diverted, developed, and used on State trust lands belonged to the State, and not trust land lessees. *Id.* The State asserted ownership of 23 water rights on this basis diverted, developed, and used on State land. *Id.* 216 Mont. at 365, 702 P.2d at 950. On appeal in *Pettibone*, the Montana Supreme Court found the State held title to these water rights, which were appurtenant to the State trust lands. *Id.* 216 Mont. at 376, 702 P.2d at 957. In particular, this Court found, "[t]he State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the

appurtenant water right, without receiving full compensation therefor." *Id.* at 368, 702 P.2d at 952.

Sometime after 1991, DSL asserted State ownership over a pre-1973 water right in the Shields River Basin, which was developed and diverted on private land and used on State trust land. As it did in *Pettibone,* DSL asserted this interest through an objection to the water right claim. *Kunnemann v. Mont. Dep't of Nat. Resources*, Case No. 43A-A, 2000 Mont. Water LEXIS 1, *12 (Mont. Water Ct. 2000).

In *Kunnemann*, the water right claimant's predecessor appropriated and perfected a water right for use on private land. *Id.* at *36. A district court had decreed that water right as appurtenant to the private property in 1911. *Id.* at *15–16. Subsequently, the predecessor began leasing adjacent State lands, and he periodically used the water right to irrigate both his private land and his State land lease. *Id.* at *36–38. In 1981, the claimant timely filed a statement of claim for the water right that included both the private land and the State trust land as the place of use for the water right. In 1995, DSL objected to the claim in Water Court, asserting an ownership interest under *Pettibone*. *Id.* at *1.

Recognizing that water right appurtenance is a question of fact, the Water Court held that, in that circumstance, the lessee's temporary use of privately developed water on State land did not appertain to State lands or create a State interest in the right. *Id.* at *17, 32–33, 45. Further, the Montana Water Court found the State, through DSL, had the burden of proof in asserting appurtenance of these water rights on State trust land, which it had failed to carry. *Id.* at *32–33. DSL did not appeal this decision.

II. ASTL has waived its right to argue ripeness on appeal.

The district court dismissed ASTL's claims for lack of ripeness on two distinct grounds. Doc. 73 at 18–26. First, it noted "there is simply an inadequate factual record 'upon which to base effective review.'" *Id.* at 19 (quoting *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 P.3d 455). Second, the district court found that, because HB 286 is procedural in nature, ASTL cannot presume a constitutional violation when the State may obtain a water right in future proceedings similar to those occurring in *Pettibone,* under the WUA. 73at 24 ("The *Pettibone* Court certainly recognized the lessees' respective due process rights via

the adjudication process. Here, HB 286 emphasizes a similar due process and adjudication procedure . . .") (citation omitted).

ASTL's argument is unresponsive to the district court's order and even fails to identify ripeness as an issue presented for review. *See* ASTL Opening Br. at 1. ASTL only mentions the ripeness doctrine twice in its opening brief. First, in arguing that it should have been permitted to amend its complaint, ASTL quotes a portion of the district court's order mentioning ripeness. *See* ASTL Opening Br. at 26 (quoting Doc. 73 at 26–27). Second, ASTL invokes the district court's ripeness finding while speculatively arguing that other statutes, which are not challenged in this litigation, "would *likely* be unconstitutional" if interpreted in a particular way. *Id.* at 18 (emphasis added). Neither of these arguments are responsive to the district court's ripeness analysis.

In avoiding the district court's ripeness finding, ASTL turns immediately to the substance of *Pettibone* in its opening brief, claiming that the district court's order should be overturned. *See* ASTL Opening

Br. at 13–18.[8] It is unclear how this argument cures ASTL's ripeness problem. Application of *Pettibone* to a hypothetical fact-pattern does not create a justiciable case or controversy, particularly when the claims at issue potentially represent numerous fact patterns. The procedural posture of *Pettibone*'s itself undermines ASTL's claims because the rights at issue in *Pettibone* were adjudicated before a court and concerned specific facts related to discrete water rights.

Given ASTL's failure to address the district court's ripeness analysis or raise ripeness as an appealable issue, this Court should find that ASTL waived the only relevant argument in this appeal. Mont. R. App. P. 12(1)(g) ("The argument shall contain the contentions of the appellant with respect to the *issues presented* ....") (emphasis added); *State v. Makarchuk*, 2009 MT 82, ¶ 19, 349 Mont. 507, 204 P.3d 1213

[8] It is worth noting that ASTL no longer asserts, as it did before the district court, that water rights are automatically conveyed to the State under *Pettibone*. *Compare* Doc. 42 at 9 (ASTL arguing before the district court that "*Pettibone* held that under constitutional trust principles, the State *automatically* becomes owner of water rights developed for use on trust lands.") (emphasis in original) *with* ASTL Opening Br. at 18 (stating that 136 water rights affected by HB 286 "are subject to the same rules as those in *Pettibone*" but failing to go as far to assert that those water rights automatically vest with the State).

("[W]e have explained that [w]e will not address the merits of an issue presented for the first time in a reply brief ….") (citation omitted).

III. The district court correctly found that ASTL's claims are not ripe.

Even if the Court advances to the question of ripeness, it should affirm the district court's holding as proper. ASTL's claims are not ripe because they do not pertain to individual, discrete water rights and because HB 286 imposes a process no different than what presently exists in the WUA for adjudication of existing water rights. Further, the process provided by HB 286, and the district court's ripeness finding, avoid the due process perils associated with a proceeding to resolve 136 water rights in one proceeding in which none of the water right holders are present.

A. ASTL's claims are not ripe because they do not pertain to individual water rights.

ASTL's claims are not ripe because they do not adequately address the individual and specific fact circumstances of the water rights at issue. *See Reichert*, ¶ 55 ("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…."); *Montanans Against Assisted*

Suicide (MAAS) v. Bd. of Med. Exam'rs, 2015 MT 112, ¶ 14, 379 Mont. 11, 347 P.3d 1244 (rejecting a request to hear a moot claim because "[i]t would be an opinion on the merits of a decision without the *benefit of concrete facts* …. We will not render such an advisory opinion.") (Emphasis added). Because this case does not concern an "'actual, 'present' controversy", *Reichert*, ¶ 54, ASTL requests a nonjusticiable advisory opinion from this *Court, Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364, 366 ("Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions.").

While ASTL has invoked, on appeal, 136 water rights that *might* be impacted by HB 286, it does not assert sufficient facts that would establish the State as an owner of these rights. The record is rife with missing and inadequate factual development that would advance ASTL's arguments. For example, ASTL initially asserted before the district court that 172 water rights were appropriated on State trust lands. *See* Doc. 68 at 5. ASTL later acknowledged that several of these water rights were transferred from private land to State trust land. *Id.* . These are factual

differences that could yield very different ownership results, underscoring the necessity of a process like that set forth in HB 286. ASTL's imprecise argumentation and attention to fact is why their ripeness argument should fail. [9]

ASTL's cavalier treatment of the facts highlights the hazard of adjudicating 136 water rights, *see* ASTL Opening Br. at 22, 24, in an omnibus proceeding without the owners of those water rights being present. In addition to preserving due process, the factual accuracy of any suit assessing the State's interest in a water right is dependent upon the presence of existing owners and users of those water rights at issue, so that the factual elements of each water right can be ascertained. ASTL's request to amend their complaint cannot save their claims from these dangers. *See* discussion *infra* Argument Section VI. 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.

[9] ASTL also incorrectly assumed that all the 172 water rights were "exempt" under MCA § 85-2-306. Doc. 68 at 1 (citing Doc. 34, ex. D).

Further, the very cases ASTL relies on in its briefings demonstrate that to establish a ripe claim, a specific water right must be at issue. ASTL's fundamental contention is that HB 286 violates *Pettibone*. *See* ASTL Opening Br. at 13–18. *Pettibone*, however, was decided in the context of the Montana Water Court's adjudication of the Powder River Basin. *Pettibone*, 216 Mont. at 364, 702 P.2d at 950. Specifically, *Pettibone* concerned four rights from ground water wells, three rights from developed springs, and 15 rights from diversions of tributaries. *Id.* 216 Mont. at 365, 702 P.2d at 950. The Water Court resolved "[a]ll of the factual disputes, as to flow, source and place of diversion and place of use" prior to the Montana Supreme Court's resolution of the appealed question of law. *Id.* 216 Mont. at 364, 702 P.2d at 950. Here, no comparable underlying factual record exists to resolve ASTL's claims.

Subsequent caselaw concerning State ownership of water rights has also carefully analyzed the facts of each claim. In *Kunnemann*, the Montana Water Court held that DSL may not reflexively assume water used on State trust land belongs to the State. *See Shields River Basin,* 2000 Mont. Water LEXIS 1 at *45–46. Instead, it cited the well-established principle that "whether a water right attaches as an

appurtenance to land in Montana is a question of fact," *id.* at *32, in finding that "the State may not presume that Kunnemann was acting on behalf of the State of Montana when he used part of his water right to irrigate school trust land, or that the water right necessarily became appurtenant to the school trust land and owned by the State of Montana," *id.* at *15.[10]

The issue of appurtenance is too fact-intensive to address in one omnibus proceeding involving 136 water rights. Appurtenance can vary based on a number of variables, including but not limited to: when and where the water right was appropriated, the priority date of the water right, the purpose for which the water is used, the history of how the water right was utilized, the language of relevant State lease documentation, and any other existing agreements between the State and lessee. *See id.* at *29–36; *see also In re Quigley*, 2017 MT 278, ¶¶ 21–30, 389 Mont. 283, 405 P.3d 627 (affirming the Water Court's review of a

[10] Further highlighting the case-by-case nature of ownership and appurtenance, a footnote in *Kunnemann* would suggest that water rights developed and used on State lands prior to their official survey may well remain in private ownership. *See id.* at *25, n.3 (citing *United States v. Wyoming*, 331 U.S. 440, 443-44 (1947) and *Clemmons v. Gillette*, 33 Mont. 321, 326, 83 P. 879 (1905)).

water master's factual findings regarding appurtenance under the clear error standard). Because the present case does not address these necessary facts for addressing appurtenance—nor could it due to absent water users—this Court does not have the necessary factual predicate to adjudicate how any of the water rights at issue are affected by HB 286.

On this basis, the district court found, "the current record contains no competent evidence that any of the trust land subject to the 141-172 rights have or will be negatively financially impacted as the result of HB 286." Doc. 73 at 18–19. In a similar vein, the district court found "the record is silent as to how many of the 141-172 rights at issue were perfected by the respective lessee under Mont. Code Ann. § 77-6-115." *Id.* at 21. The Court noted that for it to render a decision without more facts "would merely result in an advisory opinion." *Id*. at 22.

Because ASTL has failed to establish adequate facts pertaining to individual water rights, this Court should affirm the district court's ripeness finding.

B. ASTL's claims are not ripe given HB 286's procedural nature.

HB 286 clarifies the process by which the State may obtain an ownership interest in a ground water right with a point of diversion on

private land and place of use on State trust land. Specifically, HB 286 provides for State ownership by deed or by the declaration of a court of competent jurisdiction. HB 286 prevents TLMD from using Form 608 to unilaterally declare an interest in these types of water rights.

This Court has found that ripeness cannot be satisfied by speculation about future adjudicative action. *Mont. Power Co. v. Mont. Pub Serv. Comm'n*, 2001 MT 102, ¶ 38, 305 Mont. 260, 26 P.3d 91 ("we cannot interpret an act of legislation and thereby enjoin state action to preserve a property interest which does not, and may not, exist."); *Qwest Corp. v. Mont. Dep't of Pub. Serv. Reg.*, 2007 MT 350, ¶ 21, 340 Mont. 309, 174 P.3d 496 ("An agency's decision is not ripe for review if no legal consequences, rights or duties flow from an agency's actions because those actions are merely a step that could lead to a recommended change of the status quo."); *Signal Peak Energy, LLC v. Mont. Envtl. Info. Ctr.*, DA 19-0299, 2020 Mont. LEXIS 1853, *9 (Mont. Sup. Ct. June 23, 2020) finding various decisions "must first be addressed and resolved by the agency before judicial review of any constitutional questions can be undertaken. Otherwise, the parties are seeking an advisory opinion from

the courts on constitutional questions that may never be ripe or dispositive.").

This Court, however, does not need to engage in speculation about how HB 286 works, because it operates comparably to the Water Court adjudication in *Pettibone* and *Kunnemann*. In *Pettibone*, the water rights at issue were first adjudicated by the Montana Water Court, a statutory court under the WUA. *Pettibone,* 216 Mont. at 368, 702 P.2d at 952. On appeal, the Supreme Court found that those water rights (the individual factual elements of which had already been adjudicated by the Water Court) vested to the State. This Court reached this holding by analyzing, among other things, appurtenance. *Id.* 216 Mont. at 371–72, 702 P.2d at 954.

No party in *Pettibone* argued that the WUA violated the State's trust obligations by requiring the State to prove ownership of water rights in court, and the Supreme Court relied on the WUA to adjudicate the claim. Here, too, the practice of obtaining property rights through judicial action, as required by statute, is appropriate and not violative of trust obligations.

To this day, the State continues to claim pre-1973 *Pettibone* rights before the Montana 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) (TLMD filing an objection on a statement of claim pursuant to *Pettibone*); *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) (same).

HB 286's requirement that TLMD obtain an ownership determination from a court of competent jurisdiction is no more onerous than requiring TLMD to go to Water Court to argue the same for rights perfected prior to 1973. Thus, this Court should affirm the district court's finding that HB 286 is procedural in nature, *see* Doc. 73 at 24–25, rendering ASTL's claims unripe.

C. HB 286 and the district court's ripeness finding avoid due process issues.

The primary purpose of passing HB 286 was to avoid the due process concerns associated with TLMD's intra-agency filing of Form 608. "Private property is an inalienable right guaranteed by the Montana Constitution. Mont. Const. art. II, § 3. Water rights are property rights and "[d]ue process mandates notice and the opportunity to be heard prior

to modification of those rights." *Little Big Warm Ranch, LLC v. Doll*, 2018 MT 300, ¶ 11, 393 Mont. 435, 431 P.3d 342 (citations omitted). "'Notice must be reasonably calculated to inform parties of proceedings [that] may directly and adversely affect their legally protected interests.'" *Id.* (quoting *Steab v. Luna,* 2010 MT 125, ¶ 22, 356 Mont. 372, 233 P.3d 351). The Montana Legislature recognized the import of the competing interests at issue in the passage of HB 286. *See* 2019 Mont. Laws 1790, ch. 432 (including the legislative finding "the right to use water is a property right that cannot be taken without due process of law.").

ASTL's (now) tacit suggestion that this Court should declare that these water rights automatically vest to the State under *Pettibone* would disregard established constitutional authority as well as the Legislature's intent to provide adequate process. *See* ASTL's Opening Br. at 16 (the 136 water rights affected by HB286 are subject to the same rules as those in *Pettibone*."); *see also* Doc. 42 at 9 (ASTL arguing before the district court that pursuant to *Pettibone*, "the State *automatically* becomes owner of water rights developed for use on trust lands."). (Emphasis in original).

The district court's ripeness finding avoids the due process concerns implicated by ASTL's argument. Specifically, the district court first stated that it was "judicially constrained to agree" that "relative to a lessee's due process and adjudication rights" HB 286 clarifies the process by which the State may obtain ownership in certain ground water rights. Doc. 73 at 24. It further elaborated,

> The *Pettibone* Court certainly recognized the lessees' respective due process rights via the adjudication process. 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.

Id. (citing *Pettibone,* 216 Mont. at 375, 702 P.2d at 957).

As recognized in the district court's order, *Pettibone* itself acknowledges that unilaterally conferring rights to the State would violate the due process clause of the Montana Constitution. *Pettibone,* 216 Mont. at 375–76, 702 P.2d at 957 (citing Mont. Const. art. II, § 17). This Court found the adjudication process afforded by the WUA resolved any due process concerns: "Here the State, through the adjudication process, is claiming, and this Court is recognizing rights 'existing' at the time the 1972 Constitution was adopted…." *Id.* 216 Mont. at 376, 702 P.2d at 957. The adjudication process provided by the WUA was a

necessary step for the State to acquire private water rights in its name without running afoul of the due process clause.

This Court has similarly found that the WUA in other contexts satisfies due process requirements. *See In re Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992) (finding no due process violation for claimants forfeiting claims by failing to file a timely claim). Because HB 286 mimics the WUA by requiring the State to take action in a judicial setting, it should similarly be viewed as maintaining due process rights. And just like private water right holders, the Montana Legislature should be able to impose on the State "the requirement for property owners to take affirmative actions to maintain their water rights." *Id.* 253 Mont. at 174, 832 P.2d at 1214.

Accordingly, this Court should uphold the district court's ripeness finding so that HB 286 may provide the same due process protections afforded by the WUA and avoid any due process violations portended by ASTL's claims.

IV. ASTL's arguments fail on the merits.

As discussed above, ASTL ignores the district court's ripeness finding and instead focuses on the merits of its claims. Because

justiciability is a threshold requirement for advancing to the merits, *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 18–19, 333 Mont. 331, 142 P.3d 864, this Court should decline to address the issues raised in ASTL's opening brief. However, even if considered, ASTL's claims that HB 286 violates State trust obligations should be rejected on the merits.

A. ASTL fails to accurately characterize, and even misstates, the State's trust obligations.

This Court's previous decisions concerning State trust lands have hinged on two distinct trust obligations: "First, an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest .... 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." *Pettibone*, 216 Mont. at 371, 702 P.2d at 954.

The first of these obligations concerning fair market value is also known as the duty of loyalty. *See Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 36, 296 Mont. 402, 989 P.2d 800 ("MonTRUST I") (finding no violation of the duty of undivided loyalty if a statute does not "abrogate[] the trust's mandate

that full market value be obtained for school trust lands."). The second of these obligations concerning the State's managerial prerogatives is encapsulated within the policy of sustained yield. *See Jerke v. State Dep't of Lands*, 182 Mont. 294, 296–97, 597 P.2d 49, 51 (1979) (finding that the policy of sustained yield would be violated if a grazing district were permitted to exercise preference rights, as doing so would compromise the State's fiduciary duty to choose occupants of State trust land); *Pettibone*, 216 Mont. at 370, 702 P.2d at 953 ("The general question presented [in *Jerke*] was how far the State could surrender its managerial prerogatives over school lands without violating the trust."); *Steffen v. Dep't of State Lands*, 223 Mont. 176, 180, 724 P.2d 713, 716 (1986) (stating that the concept of sustainable yield "induces the state's lessees to follow good agricultural practices and make i[m]provements on the land.").

In articulating its version of these standards, ASTL overcomplicates the duties for management of State trust lands. *See* ASTL Opening Br. at 11–13. The most troubling aspect of its recitation of these standards is ASTL's argument that the State has the burden to prove HB 286 is constitutional. *See id.* at 21–22 ("The *Skamania* case,

heavily relied on by *Pettibone*, illustrates how the burden of proof should be imposed on state trustees."), *see also id.* at 24 ("the burden of proof regarding injury[11] is on the trustee…"). Even in the context of State trust duties, this Court has stated that: the party challenging the statute has the burden of proving the statute is unconstitutional beyond a reasonable doubt; all doubts regarding the constitutionality will be resolved in favor of the statute; the constitutionality of the statute will be presumed; and courts will avoid unconstitutional interpretations when possible. *MonTRUST I*, ¶ 11; *MonTRUST II*, ¶ 22.

Because this Court has provided a clear recitation of the standards for constitutional challenges to statutes applicable to State trust lands, it should reject ASTL's efforts in its opening brief to attack that precedent and foist its burden in this case on the State.

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[11] ASTL's argument on this point presumes a breach of trust duties. ASTL's Opening Br. at 21 ("When a *trustee* breaches trust duties, he bears the burden to show that beneficiaries are *unharmed*.") (emphasis in original). ASTL, however, undermines its breach allegations by agreeing that HB 286 is "mainly 'procedural.'" Doc. 68 at 5. Further, as stated herein, Montana has not violated the duty of loyalty or inhibited the managerial prerogatives of the State, so—even under ASTL's incorrect standard—the State should not have the burden of proving that HB 286 is constitutional.

B. HB 286 does not implicate the duty of loyalty because it does not dispose of State trust assets.

Consistent with the duty of loyalty, article X, section 11 of the Montana Constitution prevents the disposal of State trust lands absent compensation at fair market value. By comparison, the Montana Legislature has plenary authority over acquisitions of State trust assets. *See In re Beck's Estate*, 44 Mont. 561, 576, 121 P. 784, 788 (1912) ("The state, as a sovereign, has the capacity to acquire property by any means."); *see also Newton v. Weiler*, 87 Mont. 164, 171, 286 P. 133, 136 (1930) ("These constitutional provisions are limitations upon the power of disposal by the legislature.").

HB 286 does not allow third parties to use, or the State to dispose of, trust assets for less than full market value. *See, e.g.,* R*ider v. Cooney,* 94 Mont. 295, 308, 23 P.2d 261, 263 (1933) (finding a term lease is a disposal of State assets because "an interest or estate in the lands has been alienated"). In fact, HB 286 does not affect the disposal of State trust assets at all. Rather, HB 286 sets up a process by which the State may establish an interest in a water right with a point of diversion on private land and place of use on State trust land.

Because HB 286 does not implicate the disposal of assets, it does not trigger the duty of loyalty. This conclusion is consistent with this Court's finding in *MonTRUST II* that the duty of loyalty was not violated because no State trust assets were provided to third-parties for less than fair market value. *MonTRUST II*, ¶ 55–56. When the duty of loyalty is absent, "trustees enjoy far broader discretion." *Id.* ¶ 56.

Additionally, subsection (3) of HB 286 does not constitute a disposal of State assets. As explained above, TLMD placed the State's name on water rights by ignoring the purpose and instructions of Form 608, which required a sellers' permission prior to transferring a whole water right. *See* Doc. 47, Ex. H-002; *see also MonTRUST II*, ¶ 57 (noting that trust obligations do not allow the State to ignore its own reasonable regulations). Notably, no other established DNRC form contemplates the involuntary transfer of a water right without a deed, consent, or judgment. *See* Mont. Admin. R. 36.12.102 (2013) (listing DNRC's forms for administering the WUA). Subsection (3) of HB 286 serves as a procedural reset that will ensure due process and accuracy when the State asserts ownership over these water rights. Establishing a fair process for the State to assert or obtain ownership of these water rights

is within the Legislature's authority. *See MonTRUST II*, ¶¶ 55–57; *In re Yellowstone River*, 253 Mont. at 174, 832 P.2d at 1214; *In re Beck's Estate*, 44 Mont. at 576, 121 P. at 788.

C. HB 286 does not limit the State's managerial prerogatives.

HB 286 requires the State to actively manage its assets by appropriately responding to private water rights being used on State lands. Some of the water rights affected by HB 286 sat for over four decades before TLMD attempted to assert State ownership of these rights. *Compare* Doc. 34, Ex. D-009 (the priority date of water right 40J 1349-00 is January 17, 1974), Ex. H-002 (TLMD filed a Form 608 on the same water right on July 9, 2018). Even then, DNRC's forms did not contemplate a unilateral transfer, as discussed above. HB 286 provides TLMD clear direction as to how it may assert an interest in ground water rights with a point of diversion on private land and a place of use on State trust land: either through (1) judicial order or (2) a deed. HB 286, therefore, does not impair TLMD's ability to obtain ownership or co-ownership of water rights prospectively.

Absent HB 286, existing authorities fail to provide the proper procedure for the State to obtain an ownership interest in a ground water

right with a point of diversion on private land and place of use on trust land, for which the State was not named as an owner. For instance, DNRC's rule for water rights on trust lands does not explain how the State may obtain an interest in a water right—it simply precludes the lessee from selling State water rights. *See* Mont. Admin. R. 36.25.134(2) (1987) ("A lessee or licensee of state-owned land may not sell or otherwise dispose of a state-owned water right for any purpose.").

Furthermore, HB 286—coupled with existing authorities on improvements on State trust lands—preserves TLMD's authority to permit or prevent the conveyance and use of a private ground water right on trust lands. Specifically, Mont. Admin. R. 36.25.125 states, "A lessee or licensee may place improvements on state land which are necessary for the conservation or utilization of such state land *with the approval of the department*." (Emphasis added.) In the context of this very administrative rule, this Court has said, "[w]e must presume ... that the legislature acts with deliberation and full knowledge of all existing laws on a subject when it amends the law." *Grenz v. Mont. Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶ 46, 359 Mont. 154, 248 P.3d 785. Thus,

this Court should harmonize the tandem requirements of Mont. Admin. R. 36.25.125 and HB 286.

The limitation on managerial prerogatives raised in *Pettibone*, additionally, is not present in HB 286. *Pettibone,* 216 Mont. at 373, 702 P.2d at 955. *Pettibone* concerned the definitive ownership of the water rights appurtenant to State trust land. Thus, if the former lessee had retained the ownership of these water rights, rather than the State, the "former lessee could 'chill' the bidding process by letting it be known that he would only release his right at an inflated price." *Id*.

HB 286 does not improperly dispose of any water rights to former lessees. Instead, it serves as a procedural path for the State to assert its interest in water rights, by either obtaining the appropriate interest via deed or a court of competent jurisdiction. This does not conflict with *Pettibone*, and as mentioned above, TLMD continues to use the Water Court process to assert the State's ownership interest in pre-1973 water rights developed, diverted, and used on State trust lands. *Lybeck*, 2020 Mont. Water LEXIS 484; *Hanson*, 2020 Mont. Water LEXIS 468.

HB 286 also encourages owners of adjacent private property to use water rights on State trust land by providing ensuring procedural

protections to their water rights. One proponent of HB 286 asserted that without these procedural protections, she would not advise members of her organization to use their private water rights on land leased from the State. Senate Hearing at 15:33:46–15:35:05.[12] Intuitively, if lessees are unwilling to use water rights on State trust lands absent these protections, then the value of the State trust corpus could eventually suffer. Elimination of HB 286 and the process it provides could, in and of itself, create the "chilling" effect on bidding that ASTL fears.

Based on the commonsense inference that clarity in property law will increase land value, the district court was correct in its ruling that "there is no credible evidence that HB 286 will turn any current irrigated trust land into dry trust land. To say otherwise is speculative at best." *See* Doc. 73 at 19. These intuitive inferences are a legitimate basis for enacting HB 286 as this Court has provided the Legislature deference on dictating policy in State trust cases. *Rider*, 94 Mont. at 310, 23 P.2d at 264 ("The legislature is presumed to act, so far as mere questions of policy are concerned, with full knowledge of the facts upon which its legislation

[12] http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34020?startposition=20190318153346&mediaEndTime=20190318153505&viewMode=3&globalStreamId=5

is based, and its conclusions on matters of policy are beyond judicial consideration."); *see also id.* 94 Mont. at 311, 23 P.2d at 264–65 ("The members of the legislature, coming, as they do, from every county in the state, could not be without information as to the facts on these subjects.").

In sum, HB 286 does not inhibit the State's managerial prerogatives and furthers the concept of sustained yield. Ultimately, the purpose of the policy of sustained yield is to "induce[] the state's lessees to follow good agricultural practices and make i[m]provements on the land." *Steffen*, 223 Mont. at 180, 724 P.2d at 716. HB 286 does that by preventing TLMD from asserting State ownership over private water rights by fiat, and instead providing lessees confidence in what process will be used should the State claim an interest in their water right.

V. The district court correctly ruled on the parties' cross motions for summary judgement.

In its opening brief, ASTL asserts that the district court should not have granted the State's motion for summary judgment because there were genuine issues of material fact. *See* ASTL Opening Br. at 23–24; *see also id.* at 27 ("[I]t was arbitrary for the District Court to reject a motion to amend the complaint based on the 'evidentiary record' of a case in which the facts were still in development."). The underlying record

belies ASTL's assertion that it desired to further develop the factual record prior to the district court's ruling on the competing motions for summary judgment.

When the State filed its motion for summary judgment before the district court, ASTL did not allege that there were disputed material facts. Doc. 42 at 4–17. Instead, ASTL provided a series of legal authorities as to why the district court should rule in its favor. *Id.* Later in its own motion for summary judgment, ASTL asserted "[d]uring that briefing [on the State's motion for summary judgment], we realized the material facts concerning plaintiffs' *facial* constitutionality claims are undisputed." Doc. 53 at 2 (emphasis in original). Notably, ASTL also declined to file a motion under 56(f) or assert that further factual development was required before the State's motion could be granted. *Fabich v. PPL Mont.*, LLC, 2007 MT 258, ¶¶ 10–16, 339 Mont. 289, 170 P.3d 943 (rejecting plaintiff's argument that factual development was premature when they failed to file a Mont. R. Civ. P. 56(f) motion).

Later when ASTL filed its own motion for summary judgment, it, of course, did not allege that there were disputed material facts. Doc. 53 at 1–2. In its motion, ASTL asserted the background of facts and law

contained in briefing on the State's motion for summary judgment "*also* forms the backbone of plaintiffs' argument in *this* motion." *Id.* at 3 (emphasis in original). ASTL, accordingly, believed that the facts addressed in briefing on the State's motion for summary judgment were sufficiently developed and undisputed that it could rely on the same facts in filing its own motion.

Despite its efforts to piggyback on the facts presented in the State's motion for summary judgment, ASTL's undisputed facts in support of its motion for summary judgment were insufficiently clear to support its arguments. For instance, the twelve pages ASTL cited as containing its undisputed facts comprised almost all the argument section of its response brief to the State's motion for summary judgment, which did not include a separate fact section. Doc. 42 at 4–16. Both the State and MFBF noted in their response briefs that ASTL had failed to set forth a statement of undisputed facts with sufficient clarity. *See* Doc. 58 at 5–6; Doc. 61 at 18.

In its reply brief in support of its motion for summary judgment, ASTL provided, for the first time, a clear statement of undisputed facts. Doc. 68 at 2–5. In providing these facts, ASTL acknowledged that it had

made incorrect assumptions about the nature of some of the 172 water rights impacted by HB 286. *Id.* at 2, 5. To the extent that any dispute of material facts existed, it was the result of ASTL's failure to properly review and interpret the evidentiary record.

The relevant standards show that the district court was correct to grant the State's motion. "If the moving party satisfies its burden of showing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist." *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976.

Here, the facts brought by the State supported the nature of its arguments. For instance, the State argued that ASTL's claims were not ripe because HB 286 is procedural. Therefore, no particular water rights were—or could be—at issue. Thus, the evidentiary record would be expectedly devoid of any detailed facts about individual water rights to be adjudicated in a future proceeding.

ASTL, in contrast, argued that there was sufficient information for the district court to declare this procedural law facially unconstitutional.

See Doc. 68 at 5. By failing to assert that genuine issues of material fact existed when the district court was considering the State's and ASTL's cross motions for summary judgment, ASTL never attempted to meet its burden to overcome the State's motion for summary judgment. *See Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 34, 342 Mont. 29, 179 P.3d 481 ("the non-moving party['s burden is] to set forth specific facts, not merely denials, speculation, or conclusory statements, in order to establish that a genuine issue of material fact does indeed exist.").

Thus, the district court properly granted the State's motion for summary judgment and (as conceded by ASTL before the district court) no further factual development was required.

VI. The district court correctly denied ASTL's motion to amend.

Before turning to the substance of whether the district court correctly denied ASTL's motion to amend, it's important to note that ASTL seemingly abandoned its motion before the district court. *See* Doc. 53 at 2 ("plaintiffs now make this partial summary judgment motion to declare HB286 unconstitutional on its face .... Because this motion involves *only* allegations in plaintiffs' original complaint, it is ripe for the Court's ruling regardless of the disposition of plaintiffs' motion to

amend.") (emphasis in original). The record, therefore, demonstrates that ASTL did not view its motion to amend as necessary to further develop the evidentiary record or have its motion for summary judgment ruled on by the district court.

On substance, the district court properly denied ASTL's motion to amend its complaint because ASTL's claims would still be futile in the amended complaint. *Moody's Mkt.*, ¶ 20 ("Leave to amend is properly denied when the amendment is futile or legally insufficient to support the requested relief."). Namely, developing a factual record for 136 water rights without the owners present would create due process problems and would still fail to develop an adequate record.

As discussed above, ASTL's claims are not ripe, and their proposed amended complaint is no better. *See* Doc. 36 at 3–4 (providing a summary of ASTL's proposed changes). 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). *Id.*

As the district court properly determined, ASTL has "alleged no additional facts to show that their as applied challenge to either HB 286 or Mont. Code Ann. § 85-2-306 are ripe." Doc. 73 at 27 (citation

omitted);*see also Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont. 322, 325, 815 P.2d 1153, 1156 (1991) (plaintiff's motion to amend improperly denied when "it had new information . . . regarding possible crop loss due to an inadequate pivot No. 5."). In particular, ASTL provided no additional facts in its proposed amended complaint which would replicate either the *Pettibone* or *Kunneman* record to address the fact intensive questions implicated by their claims. *See Hickey v. Baker Sch. Dist. No. 12*, 2002 MT 322, ¶ 34, 313 Mont. 162, 60 P.3d 966 (a motion to amend is properly denied when plaintiff "simply casts its [prohibited] claims . . . in another form").

Because ASTL's proposed amended complaint would still be unripe, this Court should find that the district court did not abuse its discretion in denying the motion to amend. *See id.* (affirming a district court's denial of an amended complaint because plaintiff lacked standing); *Reier Broad. Co. v. Mont. State Univ.-Bozeman*, 2005 MT 240, ¶ 14, 328 Mont. 471, 121 P.3d 549 (affirming a district court's denial of an amended complaint because the court did not have subject matter jurisdiction); *Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, ¶ 29, 393 Mont. 396, 431 P.3d 911 ("a court may nonetheless consider the threshold legal

sufficiency of a *proposed* claim under the standards of M. R. Civ. P. 15(a).") (Emphasis in original); *see also Emmanuel Temple v. Abercrombie*, 903 F. Supp. 2d 1024, 1032 (D. Haw. 2012) ("If Plaintiffs would lack standing to bring an amended complaint, the court need not prolong the litigation by permitting further amendment.") (citation and quotation marks omitted).

Furthermore, as discussed above, allowing ASTL to amend their complaint to address ownership of individual water rights would violate principles of due process. *See* discussion *supra* Argument Section III.C. By attempting to address these water rights in an omnibus proceeding, ASTL would deprive the owners of these water rights an opportunity to be heard. *Cf. Ioerger v. Reiner*, 2005 MT 155, ¶ 22, 327 Mont. 424, 114 P.3d 1028 ("The basis of the rule on joinder is founded on due process considerations of notice and a right to be heard.") (citation omitted). The question of appurtenance is also highly fact-intensive, based on a number of factors including a water right holder's intent. *See Kunnemann*, 2000 Mont. Water LEXIS 1, at *33 ("the facts and circumstances of the case indicate *intent* on the part of the water right owner to make the water appurtenant to the land.") (emphasis in original). Thus, attempting to

develop the requisite record to determine the proper ownership of 136 water rights, without the water right holders present, would be next to impossible.

In sum, the district court decision to deny ASTL's motion to amend was correct as it avoided prolonging futile claims.

CONCLUSION

For the reasons provided above, Montana respectfully requests this Court affirm (1) the district court grant of the State's motion for summary judgment, dismissing ASTL's claims as unripe; (2) the district court's denial of ASTL's motion for summary judgment; and (3) the district court denial of ASTL's motion to amend its complaint.

DATED this 15th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,601 words, excluding certificate of service and certificate of compliance.

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