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ANGIE SPARKS, Clerk of District Court
By ~~D NASON~~
Deputy Clerk

1 Roy H. Andes
2 3562 Bear Creek Rd.
3 Driggs, Idaho 83422
4 phone: 406-431-0869
5 email: ra@royandes.com

6 Attorney for Plaintiffs

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8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
9 **LEWIS & CLARK COUNTY**

10

11 Advocates for School Trust Lands; & Kintla and
12 Keir Balukas, by and through their parent and
13 general guardian,

14 Plaintiffs,

15 vs.

16 State of Montana,

Defendant.

17 } Cause No. BDV 2019-1212

18 }
19 } Complaint for Declaratory
20 } Relief, Preliminary and
21 } Permanent Injunction &
22 } Attorney Fees

23 COMES NOW the Plaintiffs, who allege as follows:

24 **Nature of the Claims**

25 1. Plaintiffs seek declaratory and injunctive relief regarding actions of the State of
26 Montana in its role as trustee of trust lands belonging to Montana's constitutional trusts.
27 These actions include: House Bill 286, 2019 Legislature ("HB286"), and acts of the
28 legislative and executive branches of government performed in implementation of HB286.
They expressly violate the holding of the Supreme Court in *Department of State Lands v.*
Pettibone, (Mont., 1985). Plaintiffs ask that all such acts be declared invalid, void, and
unenforceable, and for the Court to set them aside in perpetuity. Plaintiffs also seek award of

1 their attorney fees and costs, and various other relief.

2 **Parties**

3 2. Plaintiff, Advocates for School Trust Lands (“ASTL”), is a nationwide non-
4 profit membership social advocacy organization, registered in the state of Utah. ASTL
5 consists of educators, parents, school board members, state land commissioners, productive
6 land users and others working to ensure the trust land commitment to today's schoolchildren
7 and future generations is honored.. The members, directors, and officers of ASTL include
8 parents of children who attend Montana public schools or universities, or reasonably expect
9 they may in the future become so. ASTL is the successor in interest to “Montanans for the
10 Responsible Use of the School Trust,” also known as “MonTRUST.” The genuine existing
11 and substantial rights of the members of ASTL are detrimentally affected by the actions of
12 defendants alleged below. ASTL’s prosecution of this cause of action was unanimously
13 approved by its board of directors.

14 3. Plaintiffs, Kintla and Keir Balukas, by the through their parent and general
15 guardian, Martin L. Balukas, are minors and students who attend public schools in the State of
16 Montana. They reside in Helena.

17 4. Defendant, State of Montana, is the trustee of the common school trust and
18 other constitutional trusts charged with management of the trusts as described below.

19 **Background Factual and Legal Allegations**

20 5. The State of Montana administers approximately five million acres of land
21 granted to Montana by the United States in trust for the support of public institutions under
22 the Omnibus Enabling Act, 25 Stat 676 (1889), as amended , 47 Stat. 150 (1932), and Article
23 X, § 4, of the Montana Constitution. Under direction of the Montana State Land Board, the
24 Department of Natural Resources & Conservation (“DNRC”) manages those lands pursuant
25 to §77-1-301, MCA.

26 6. Under the Enabling Act, Constitution, and other acts of Congress, all trust lands
27 are held by the State of Montana as a sovereign trust for the exclusive support of beneficiary

1 institutions. Typically, with many exceptions, trust lands comprise sections 16 and 36 of every
2 township in the State, each section comprising 640 acres of land.

3 7. With regard to trust lands, the 1889 Enabling Act, at Section 11, and the
4 Constitution, at Art. X, impose the following duties upon the State and Board, *inter alia*:

5 a. The public trust fund, including the lands which are a part of that fund,
6 shall forever remain inviolate, guaranteed by the state against loss or diversion.

7 b. They shall be held in trust for the people, to be disposed of as provided
8 in the Constitution, for the respective purposes for which they have been granted,
9 donated or devised.

10 c. No such land or any estate or interest therein shall ever be disposed of
11 except in pursuance of general laws providing for such disposition, nor until the full
12 market value of the estate or interest disposed of, to be ascertained in such manner as
13 may be provided by law, has been paid or safely secured to the state.

14 8. As described above, in creating a formal legal trust for the management of trust
15 lands, the Constitution and Enabling Act impose the following duties upon the State of
16 Montana, and all its agents, including the Legislature, the Land Board, and DNRC. They are
17 obligated, among other constitutionally mandated duties:

18 a. To exercise reasonable competence in trust administration-- prudence;
19 b. To act with undivided loyalty solely in the interest of the beneficiaries as
20 to matters that directly and indirectly involve trust property--loyalty;
21 c. To carry out the intentions of the grantor of the trust-- fidelity;
22 d. To act to make the trust economically productive-- productivity; and
23 e. To be accountable to the beneficiary--accountability.

24 9. The foregoing duties imposed upon the State of Montana apply as much to
25 actions of the Legislature as to those of the Land Board and DNRC. The legislature of
26 Montana acting at various times in it's capacity as legislative branch of government has
27 enacted various statutes affecting trust lands.

1 10. Since statehood, the Montana Supreme Court has maintained a vigilant scrutiny
2 of the State of Montana's practices, rules, statutes and management decisions in its role as
3 constitutional trustee of trust lands. The Court has often overturned or otherwise declared
4 various practices, rules or statutes to be breaches of the State's trust obligations under the
5 Constitution and 1889 Enabling Act. Among others, those decisions include, *State ex rel*
6 *Bickford v. Cook* (1896), 17 Mont. 529, 43 Pac.928 (trust land revenues are not subject to
7 executive appropriation process); *State ex rel Koch v. Barrett* (1901), 26 Mont. 62, 66 Pac.
8 504 (trust revenue is not subject to legislative appropriation); *State ex rel. Galen v. Dist.*
9 *Court* (1910), 42 Mont. 105, 112 P. 706 (trust lands are immune from statutory
10 condemnation); *State ex rel. Gravely v. Stewart* (1913), 48 Mont. 347, 137 P. 854 (bidder for
11 trust land charged with knowing discretionary power of Land Board to reject his bid); *Rider v.*
12 *Cooney* (1933), 94 Mont. 295, 23 P.2d 261 (State must obtain full market value for leases of
13 trust land); *Jerke v. State Dept. of Lands* (1979), 182 Mont. 294, 597 P.2d 49 (preference right
14 to lessee grazing district was unconstitutional dereliction of State's duties as trustee).

11. Still later, this district court rendered its decision in *Montanans for the Responsible Use of the School Trust v. State*, Cause No. ADV 97-134 (1st Jud. Dist, April 1, 1998), *affirmed in part, reversed in part*, 1999 MT 263, 989 P.2d 800 (“*MonTRUST 1*”). Collectively, applying the constitutional trust duties referenced above in paragraphs 7 and 8, the District and Supreme Courts in *MonTRUST 1* found 12 different Montana statutes facially violated the state’s trust lands duties under the Constitution and Enabling Act, and a 13th statute did so as applied. The Court enjoined the implementation of all 13 statutes.

The History of Water Rights on Trust Lands

23 12. Since statehood, the State of Montana has leased various parcels of trust land to
24 private parties for agriculture, grazing and other activities. At present, there are approximately
25 9,000 trust land lease agreements for crop and rangeland on 4.76 million acres of trust lands.
26 Typically, such grazing and agriculture tracts consist of large parcels of land in rural areas
27 with very little infrastructure and access.

1 13. For those and other reasons, agriculture and grazing leases on trust lands are
2 commonly leased by a single individual, family, or company who continues to occupy the
3 leasehold year after year, renewing their leases, typically without competing bids, and literally
4 retaining the same leasehold for generations. As a result, agriculture and grazing revenue
5 from leased trust lands have *seldom* returned fair market value to the trust. Economic studies
6 conducted by the State and by independent experts over the years have consistently so
7 concluded.

8 14. Like most of the arid west, the value of trust lands used for agriculture and
9 grazing are hugely impacted by the presence or absence of available water for irrigation and
10 stock watering. In turn, the financial return to the respective trusts are profoundly affected by
11 the availability of water rights appurtenant to trust land. Under Montana law a water right is
12 recognized as a usufructuary property right.

13 15. Waters are the property of the State of Montana held in public trust for the use
14 of the people, and are not alienable to private interests to the detriment of the public.

15 16. Recognizing these things, in 1985 the Montana Supreme Court applied the
16 State's constitutional trust duties in *Department of State Lands v. Pettibone* (1985), 702 P.2d
17 948, 952, 216 Mont. 361, 368, to answer the question:

18 “Who is the owner of a water right diverted *or* developed on school trust land;
19 the State or the lessee?” (emphasis added).

20 21. *Pettibone* held, “..that title to these water rights vests in the State. The lessee, in
21 making appropriations on and for school trust sections, is acting on behalf of the State.” *Id.*
22 The *Pettibone* decision applied universally to all water rights diverted or developed on trust
23 land without distinction with regard to point of diversion or antiquity of the right.

24 25. The Court reached its decision based on two main constitutionally-derived
25 principles:

26 27. ..an interest in school land cannot be alienated unless the trust receives adequate
27 compensation for that interest. Water that is appurtenant to the school lands is
28 an interest for which the trust must receive compensation. Second, any law or
28 policy that infringes on the state's managerial prerogatives over the school lands
cannot be tolerated if it reduces the value of the land. *Id.*, 702 P.2d at 954, 216

1 Mont. at 371.

2 19. The Court in *Pettibone* added,

3 The State has no power, absent adequate consideration, to grant the lessees the
4 permission to develop non-appurtenant water rights, and every school trust lease
carries with it this limitation...The Montana Constitution requires this result. *Id.*,
702 P.2d at 957, 216 Mont. at 375.

5 20. Consistent with *Pettibone*, since March 1987, DNRC's administrative rules, at
6 §36.25.134, A.R.M, have provided,

7 WATER RIGHTS. (1) If a water right is or has been developed on state land by
8 the lessee or licensee for use on the leased or licensed land, such water right
9 shall belong to the state. The lessee or licensee shall be entitled to compensation
10 for the reasonable value of the improvements associated with the water right by
11 any new lessee, licensee, or purchaser if such improvements are sold to a new
12 lessee or licensee or purchaser as provided in ARM 36.25.125. This shall not be
13 construed to make the state liable for the value of any water right. Any water
14 rights hereafter secured by the lessee and licensee on state lands shall be
15 secured in the name of the state of Montana.

16 (2) A lessee or licensee of state-owned land may not sell or otherwise dispose of
17 a state-owned water right for any purpose. Such practices may constitute
18 sufficient grounds for cancellation of the lease or license.

19 21. The *Pettibone* decision and §36.25.134, A.R.M, have been contractually
20 imposed on every trust lease issued since at least 1987. To wit, the lease under which DNRC
21 leases trust land agriculture and grazing leases expressly provides,

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

25 22. In addition, DNRC has periodically instructed trust land lessees to comply with
26 *Pettibone* by assigning appropriate preexisting water rights developed on trust lands to the
27 State, and has taken steps to enforce those assignments.

28 23. Since *Pettibone*, however, a number of lessees have sought to develop water
rights on trust lands by creating points of diversion on private land with the intention of
applying the developed water right to their leasehold interest on trust land. Approximately 172
such water rights, of substantial value, have been developed, or transferred by certificate of
transfer to trust lands. Upon information and belief, the vast majority of these were newly
developed water rights, explicitly intended for beneficial use in whole or in part on trust land.

1 24. Thereupon, DNRC demanded the enforcement of *Pettibone* and §36.25.134,
2 A.R.M to those diversions, consistent with Montana water law.

3 25. However some lessees objected. Based on their objections, the 2019 Montana
4 legislature passed House Bill 286 (“HB286”), which provides, in substantive part, as follows:

5 **Section 1. Temporary use of a water right on state trust land -- restrictions
6 on state ownership -- rescinding of noncompliant ownership interests
7 required.** (1) A water right owner may put water from a well or developed
8 spring with ground water development works located on private land to
9 beneficial use on state trust land for the duration of a state land lease the water
10 right owner holds.

11 (2) The state may not obtain an ownership interest in a water right or the ground
12 water development works of a water right that is diverted from a well or
13 developed spring located on private land exclusively based on trustee
14 obligations for state trust land unless: (a) a court of competent jurisdiction
15 determines that the state is an owner of that particular water right; or (b) the
16 state is in possession of a deed transferring ownership of the water right to the
17 state.

18 (3) Before September 30, 2019, the state shall rescind any claim of ownership it
19 asserted or acquired to satisfy trustee obligations for state trust land prior to [the
20 effective date of this act] in a water right or ground water development works
21 that do not meet the requirements of subsection (2). (bold in original).

22 26. HB286 was enacted into law without the governor’s signature. In the fiscal note
23 for HB286, the Budget Director expressly commented that the bill appeared to violate the
24 Montana Constitution in light of *Pettibone*.

25 **HB 286's Violations of the Enabling Act & Constitution**

26 27. Subsection (1) of Section 1 of HB286 on its face violates the State’s
27 management prerogatives concerning trust land by eliminating the State’s capacity to consent
28 and negotiate the terms of its leases with respect to water rights. This also violates the State’s
29 constitutional trust duties of prudence, productivity, and fidelity. Doing so is also inconsistent
30 with established water law, which otherwise allows lessors and lessees of land to negotiate
31 between them with respect to the appurtenance of developed water rights. It violates
32 constitutionally mandated trust duties of “loyalty,” by creating a water law rule for trust land
33 which is less favorable to the trust than the equivalent rule regulating entirely private
34 transactions. Furthermore, subsection (1) is unconstitutionally vague, referring in its non-

1 substantive title to “temporary use” of water, with no definition of that term and no limitation
2 imposed on the duration of that use in the body of the legislative text.

3 28. Subsection (2) of Section 1 of HB286 on its face unconstitutionally rejects
4 “trustee obligations for state trust land,” explicitly commanding a violation of the 1889
5 Enabling Act and Constitution which are the express source of such “trust obligations.” The
6 legislature has no power by ordinary legislative enactment to modify duties and obligations
7 imposed by either the Enabling Act or Constitution. Furthermore, this subsection is
8 inconsistent with established water law, which otherwise allows lessors and lessees of land to
9 negotiate and agree between them with respect to the appurtenance of developed water rights
10 by lease or other agreement, without regard to mandatory additional elements such as a
11 “deed” or court decree. It therefore violates constitutionally mandated trust duties of
12 “loyalty,” by creating a water law rule for trust land which is less favorable to the trust than
13 the equivalent rule regulating entirely private transactions. Also, the subsection is
14 unenforceable as unconstitutionally vague in failing to reasonably define what it means by
15 “exclusively based on trustee obligations.” 1972 Const, Art. II, §17.

16 29. Subsection (3) of Section 1 of HB286 is unconstitutional in multiple respects:

17 a. On its face, subsection (3) divests the trusts of assets without
18 compensation to the trust corpus in violation of the fiduciary obligations of the State as
19 recognized in numerous authorities, cited above.

20 b. On its face, subsection (3) retroactively imposes a loss to trust assets in
21 violation of the due process rights of the State as trustee, and of plaintiffs, as
22 beneficiaries of the trusts.

23 c. As applied, the directive that the state rescind claims of water rights
24 retroactively, unconstitutionally impairs contracts, previously made and executed in
25 violation of Article II, Sec. 31 of the Constitution.

26 **Count I--Declaratory Judgment-Violation of Enabling Act & Constitution**

27 30. Plaintiffs are entitled to declaratory judgment that each of the acts described

above in violate the Montana Enabling Act and Constitution.

Count II--Declaratory Judgement, Provisions Are Void

31. The Court should issue declaratory judgement that the unlawful provisions described above in HB286, Section 1 are null, void and of no legal effect under Montana law.

Count III– Prohibitive and Mandatory Injunctions

32. Implementation and enforcement of the provisions described above causes substantial harm to plaintiffs, as well as to all other beneficiaries of the constitutional trusts throughout the State of Montana. Unless permanently enjoined from the implementation and enforcement of such provisions, that harm will continue to all beneficiaries of the trusts.

33. The court should enjoin the defendant from all implementation and enforcement of HB286.

34. The court should set aside all such transactions already transpired, and mandatorily enjoin defendant to perform those and other trust duties with diligence and dispatch as required by applicable provisions of trust law.

Count IV– Preliminary Injunction

35. Under the terms of HB286, on or before September 30, the State will implement the permanent revision of preexisting water rights as denominated in the Act. This will result in the permanent loss of approximately 172 water rights to the trust in every part of the State of Montana. Doing so would irreparably injure the plaintiffs and all other beneficiaries of the trust in contravention of the Montana Constitution and 1889 Enabling Act.

36. If the other subsections of Section 1 of the Act are allowed to go into effect, they will immediately interfere with settled lease rights concerning thousands of trust land leases, and deprive trust managers of important discretionary tools in managing the trust.

37. There will be no harm in preliminary enjoining those conveyances and rules pending the outcome of this litigation.

Count V--Attorney's Fees and Costs

38. With regard to trust lands, the State has a duty to enact and enforce only statutes

which uphold the trust responsibilities of the Enabling Act and Constitution of Montana, and none which violate them.

39. The State have failed, neglected, and refused to challenge or invalidate any part of HB286 though plaintiffs' counsel has requested that they do so.

40. Therefore, plaintiff has been forced to prosecute this action in the Attorney General's stead. Under the private attorney general doctrine announced in *MonTRUST 1*, plaintiffs are entitled to an award of its reasonable attorney's fees and costs against any and all parties opposing its positions in this matter.

41. Under the law of trusts, ASTL respectfully requests,

a. that any and all attorney fees awarded to it against the State of Montana be surcharged specifically against funds of the State of Montana as breaching trustee, and

b. that the State be enjoined from paying any costs or fees of this litigation out of the corpus or income of the trust, itself, or out of any other account that is statutorily or otherwise committed to be expended for the beneficiaries.

Relief Sought

Wherefore, plaintiffs ask the Court for the following relief:

1. For a preliminary injunction halting the all application of HB286;
2. For declaratory judgments as described above in Counts I and II;
3. For a permanent prohibitive and mandatory injunctions as described above in IV.
4. For reasonable attorney's fees and costs as described above in Count V.

DATED this 6th day of September, 2019.


ROY H. ANDES
Attorney for Plaintiffs