

MONTANA JUDICIAL DISTRICT COURT
CLERK DISTRICT COURT

2004 JUL 15 P. 3: 16

FILED
BY McIntosh
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

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

WILLIAM S. BROADBENT,

Petitioner,

v.

STATE OF MONTANA, ex rel., BOARD
OF LAND COMMISSIONERS; THE
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION;
and GALE A. and ANDREA HARLOW;

Respondents,

and

MONTANA STOCKGROWERS
ASSOCIATION; MONTANA PUBLIC
LANDS COUNCIL; and MONTANA
ASSOCIATION OF GRAZING
DISTRICTS,

Respondent-Intervenors.

Cause No. BDV-2003-361

**ORDER ON PETITION FOR
JUDICIAL REVIEW**

ENVIRONMENTAL QUALITY
COUNCIL. 2015-16

September 9, 2015

Exhibit 3

This matter is before the Court on Petitioner William S. Broadbent's
(Broadbent) petition for judicial review of the Respondent State of Montana, Board of
Land Commissioners' decision to (1) accept Co-Respondent Gale A. and Andrea

23
24
25

1 Harlows' exercise of their "preference rights" in a certain grazing lease permit on state
2 lands after Broadbent had entered a high bid for the lease and (2) reduce the rate the
3 Harlows would pay for the lease from the high bid they agreed to meet. The Montana
4 Stockgrowers Association, Montana Public Lands Council and Montana Association of
5 State Grazing Districts intervened as respondents and submitted a brief in support of the
6 Board of Land Commissioners' final decision.

7 **Factual Background**

8 This dispute revolves around a section of state land that is classified as
9 grazing land by the Montana Department of Natural Resources and Conservation
10 (DNRC). The "State Section" is described as Section 36, Township 19 North, Range 10
11 East. Davis Creek Ranch, owned by Respondents Harlows, borders the State Section.
12 The Harlows leased the State Section for a term of ten years, with an expiration date of
13 February 28, 2003. Broadbent sought to acquire the lease of the State Section upon the
14 expiration of the Harlows' lease. Broadbent submitted a competitive bid of an annual
15 rental payment of \$23.00/AUM (Animal Unit Month). The Harlows were paying the
16 minimum rental rate of \$5.77/AUM.

17 After receipt of the competitive bids, the DNRC notified the Harlows that
18 they had been outbid and inquired whether they wished to exercise the "preference right"
19 provided by Section 77-6-205(1), MCA. The Harlows exercised this right by tendering
20 one year's rental rate at the high bid amount. The Harlows then petitioned for an
21 administrative hearing to reduce the rental rate in accordance with Section 77-6-
22 205(2), MCA. The administrative hearing was held on April 23, 2003. The Director
23 of the DNRC submitted his findings and recommended conclusions to the Board of
24 Land Commissioners (Land Board) on April 28, 2003. On May 19, 2003, the Land
25 Board accepted the DNRC's recommendations on Lease No. 9904.

1 Broadbent received notification of the hearing and of his right to appear
2 and give justification for his bid. The purpose of the hearing was not to determine the
3 proper lessee, but to ascertain whether the bid amount represented the fair market value
4 of the lease and whether the rental rate was in the best interest of the trust. (Pls. Ex. 1.)
5 The notice informed Broadbent that "the lessee has exercised their preference right,
6 therefore the lease will be issued to them. The only matter to be discussed at the hearing
7 is whether their [sic] should be any adjustment to the bid amount." (Letter of March 25,
8 2003, from Kevin Chappel, Chief, Agric.& Grazing Mgmt. Bureau, to Bill Broadbent.)

9 Broadbent appeared at the hearing through his counsel Harley R. Harris.
10 Harris indicated that Broadbent's main objective in obtaining the lease was to implement
11 mixed conservation and light touch ranching techniques to conserve traditional values of
12 ranching while balancing that with wildlife preservation. Harris submitted letters of
13 support for Broadbent's conservation efforts from the Montana Land Reliance and the
14 Montana Audubon Society. Harris suggested that Broadbent wished to obtain the lease
15 to gain better access to his irrigation ditches and headgates. Harris further stated that
16 Broadbent believed the lease to be in a degraded state. Harris argued that Broadbent's
17 offer was to pay more money to run fewer cows and to actually bring more management
18 resources to that tract. The Harlows said that Broadbent does not run any cows on his
19 personal property. The Harlows also suggested that Broadbent entered a high bid for the
20 tract to spite the Harlows because of a water rights dispute between the two.

21 The lease file indicated that the tract was in good condition and did not
22 cite any negative practices by the Harlows. The file indicated that a prairie dog colony
23 was degrading a portion of the tract. The lease file did not indicate the presence of
24 noxious weeds on the tract. A range evaluation form for the tract indicated marks of
25 poor conditions, fair conditions, low-good and good conditions.

1 The Director listened to the evidence, reviewed the lease file and rental
2 rates of other existing leases in the area, and recommended that the Land Board set the
3 rental rate for Lease No. 9904 at a rate of \$10.52/AUM. This rate was said to represent
4 the best measure of a "community standard" and full market value. The Harlows and
5 Broadbent then argued their positions at the administrative hearing. The Board accepted
6 the Director's recommendation and set the rental rate for Lease No. 9904 at
7 \$10.52/AUM. The Harlows retained the lease and were obligated to pay future rentals of
8 the lease at that rate. In response, Broadbent petitioned this Court for judicial review of
9 the Land Board's actions.

10 Standard of Review

11 A district court review of an administrative agency's order is governed by
12 the Montana Administrative Procedure Act. The standard of review for an agency
13 decision is set forth in Section 2-4-704(2), MCA, which provides:

14 (2) The court may not substitute its judgment for that of the agency
15 as to the weight of the evidence on questions of fact. The court may
16 affirm the decision of the agency or remand the case for further
17 proceedings. The court may reverse or modify the decision if substantial
18 rights of the appellant have been prejudiced because:

- 17 (a) the administrative findings, inferences, conclusions, or decisions are:
18 (i) in violation of constitutional or statutory provisions;
19 (ii) in excess of the statutory authority of the agency;
20 (iii) made upon unlawful procedure;
21 (iv) affected by other error of law;
22 (v) clearly erroneous in view of the reliable, probative, and
23 substantial evidence on the whole record;
24 (vi) arbitrary or capricious or characterized by abuse of discretion
25 or clearly unwarranted exercise of discretion; or
(b) findings of fact, upon issues essential to the decision, were not
made although requested.

23 The Montana Supreme Court has adopted a three-part test to determine if a
24 finding is clearly erroneous. Weitz v. Mont. Dep't of Natural Res. and Conservation,
25 284 Mont. 130, 943 P.2d 990 (1997). First, the court is to review the record to see if

1 the findings are supported by substantial evidence. Second, if the findings are supported
2 by substantial evidence, the court is to determine whether the agency misapprehended
3 the effect of the evidence. Third, even if substantial evidence exists and the effect of the
4 evidence has not been misapprehended, the court can still determine that a finding is
5 clearly erroneous "when, although there is evidence to support it, a review of the record
6 leaves the court with the definite and firm conviction that a mistake has been
7 committed." Weitz, 284 Mont. at 133-34, 943 P.2d at 992. Conclusions of law, on the
8 other hand, are reviewed to determine if the agency's interpretation of the law is correct.
9 Steer, Inc. v. Dep't of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

10 Whether findings of fact are supported by substantial evidence is an issue of law and is
11 reviewed for correctness. Moran v. Shotgun Willies, Inc., 270 Mont. 47, 52 889 P.2d
12 1185, 1187 (1995).

13 An agency can reject or modify a hearing officer's conclusions of law and
14 interpretation of administrative rules. State Pers. Div., Dep't of Admin. v. Dep't of Pub.
15 Health & Human Serv., Child Support Div., 2002 MT 46, ¶ 62, 308 Mont. 365, ¶ 62, 43
16 P.3d 305, ¶ 62. However, a district court is bound by the agency's conclusions of law
17 and interpretation of administrative rules if they were correct. Id. ¶ 63. The district
18 court may not alter the conclusions of the agency unless such conclusions were arbitrary
19 and capricious. European Health Spa v. Human Rights Comm'n, 212 Mont. 319, 326,
20 687 P.2d 1029, 1033 (1984).

21 Jurisdiction

22 A petition for judicial review is brought pursuant to Section 2-4-702,
23 MCA, which permits a person who has exhausted all administrative remedies available
24 within the agency and who is aggrieved by a final decision in a contested case to petition
25 the district court for judicial review. A party who proceeds before an agency under the

1 terms of a particular statute is permitted to question the validity of that statute on
2 judicial review. Section 2-4-702(1)(b), MCA. An individual can challenge the
3 constitutionality of an agency's decision under Section 2-4-704, MCA, which states that
4 a court may reverse or modify an agency decision if substantial rights of the appellant
5 have been violated because the decision is in violation of statutory or constitutional
6 provisions or were made arbitrarily or capriciously or were characterized by abuse of
7 discretion or were a clearly unwarranted exercise of discretion.

8 A court's jurisdiction to review an administrative decision is statutorily
9 created and limited. Hilands Golf Club v. Ashmore, 2002 MT 8, ¶ 18, 308 Mont. 111, ¶
10 18, 39 P.3d 697, ¶ 18. In Hilands Golf Club, the Montana Supreme Court concluded that
11 the language of Section 2-4-702(1)(b), MCA, was clear that "a party may question the
12 validity of a statute for the first time on judicial review to the district court. Other than
13 that exception, all other issues must be raised at the administrative level absent good
14 cause." Hilands Golf Club, ¶ 21.

15 Respondent-Intervenors challenge this Court's jurisdiction to decide the
16 constitutionality of Section 77-6-205, MCA, because Broadbent did not bring the action
17 under the declaratory judgment statute, Section 27-8-201, *et seq*, MCA. Respondent-
18 Intervenors' argument fails because Broadbent brought this suit for judicial review under
19 Section 2-4-702, MCA. Section 2-4-702(1)(b), MCA, permits a party to challenge the
20 validity of a statute in a petition for judicial review.

21 **Standing**

22 A threshold issue of every case is the requirement that the plaintiff allege
23 "such a personal stake in the outcome of the controversy as to assure that concrete
24 adverseness which sharpens the presentation of issues." Roosevelt v. Mont. Dept. of
25 Rev., 1999 MT 30, ¶ 48, 293 Mont. 240, ¶ 48, 975 P.2d 295, ¶ 48 (quoting Baker v.

1 Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663, 678 (1962)). This
2 principle is generally referred to as standing to sue. "The question of standing is whether
3 the litigant is entitled to have the court decide the merits of the dispute or of particular
4 issues." Gryczan v. State, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997).

5 The Montana Supreme Court has set forth the following criteria that must
6 be satisfied to establish standing: "(1) The complaining party must clearly allege past,
7 present or threatened injury to a property or civil right; and (2) the alleged injury must be
8 distinguishable from the injury to the public generally, but the injury need not be
9 exclusive to the complaining party." Gryczan, at 242-43, 924 P.2d at 118. A plaintiff is
10 required to allege "a personal stake in the outcome of the controversy. [I]t is not enough
11 that appellants allege an injury which others may have suffered by the operation of some
12 statute. They must allege an injury personal to themselves as distinguished from one
13 suffered by the community in general." Helena Parents Comm'n v. Lewis & Clark
14 County Comm'rs, 277 Mont. 367, 371-372, 922 P.2d 1140, 1143 (1996) (citations
15 omitted).

16 Respondent-Intervenors challenge Broadbent's standing to challenge the
17 constitutionality of a statute designed to protect the beneficiaries of the trust for public
18 schools. The Court concludes that Broadbent has standing to challenge the
19 constitutionality of Section 77-6-205, MCA, because he has alleged a concrete and
20 personal injury in the deprivation of a lease for which he was the high bidder. The statute
21 has worked to deprive Broadbent of a lease to the state lands, and this injury is
22 sufficiently direct and personal to confer standing.

23 Discussion

24 Under the Enabling Act of 1889, the federal government granted Montana
25 the sixteenth and thirty-sixth section of each township in Montana for the support of

1 common schools. Act of February 22, 1889, ch. 180, 25 Stat. 676, § 10 (1889)
2 (hereinafter “Enabling Act”). The Montana Constitution declares that the public school
3 fund of the state consists of proceeds from the school lands that had been or would be
4 granted to the state by the United States. Art. X, § 2(1), Mont. Const. The Board of
5 Land Commissioners “has the authority to direct, control, lease, exchange, and sell
6 school lands and lands which have been or may be granted for the support and benefit of
7 the various state educational institutions, under such regulations and restrictions as may
8 be provided by law.” Art. X, § 4, Mont. Const. Finally, the constitution states that the
9 public lands of the state are held in trust for the people and these lands shall not be
10 disposed of “except in pursuance of general laws providing for such disposition, or until
11 the full market value of the estate or interest disposed of, to be ascertained in such
12 manner as may be provided by law, has been paid or safely secured to the state.” Art. X,
13 § 11(1),(2), Mont. Const.

14 The federal government’s grant of lands for the support of public schools
15 constitutes a trust, the terms of which are set forth in Montana’s Constitution and the
16 Enabling Act. Montanans for the Responsible Use of the Sch. Trust v. Mont. ex rel. Bd.
17 of Land Comm’r, 1999 MT 263, ¶ 13, 296 Mont. 402, ¶ 13, 989 P.2d 800, ¶ 13
18 (hereinafter “Montrust”). The State of Montana is the trustee of the school trust lands,
19 and the State Board of Land Commissioners is the entity that was created to administer
20 that trust. Montrust, ¶ 14. The Land Board is bound to so administer the trust as “to
21 secure the largest measure of legitimate advantage to the beneficiary of it.” Id. (citing
22 State v. Stewart, 48 Mont. 347, 349-50, 137 P. 854, 855 (1913)). Montana’s
23 constitutional provisions limit the legislature’s power of disposal of trust lands. Id.
24 (citing Rider v. Cooney, 94 Mont. 295, 307, 23 P.2d 261, 263 (1933)). “One limitation
25 on the legislature’s power of disposal is the trust’s requirement that full market value be

1 obtained for trust lands.” Id.

2 The trust for public schools is governed by principles similar to private
3 charitable trusts. Dep’t of State Lands v. Pettibone, 216 Mont. 361, 369, 702 P.2d 948,
4 953 (1985). Principles of trust administration are set forth in Title 72 of the Montana
5 Code. A trustee has a duty to manage the trust assets as a prudent investor would, by
6 considering the purposes, terms, distribution requirements, and other circumstances of
7 the trust. Section 72-34-603(1), MCA. A trustee must manage the trust asset with
8 reasonable care, skill and caution. Id. In addition:

9 A trustee's investment and management decisions respecting
10 individual assets and courses of action must be evaluated not in isolation,
11 but in the context of the trust portfolio as a whole and as a part of an
12 overall investment strategy having risk and return objectives reasonably
13 suited to the trust.” Section 72-34-603(2), MCA. A trustee owes to the
beneficiaries of the trust a duty of undivided loyalty. A duty of undivided
loyalty means that the “trustee must act with the utmost good faith towards
the beneficiary, and may not act in his own interest, or in the interest of a
third person.

14 Montrust, ¶ 41 (citing Wild West Motors, Inc. v. Lingle, 224 Mont. 76, 82, 728 P.2d
15 412, 415-16 (1986)).

16 A lease for grazing purposes cannot exceed a term of ten years. Enabling
17 Act, § 11. However, an incumbent lessee has a preferred right of renewal in the grazing
18 lease and is thus able to acquire another ten-year term provided he or she has not
19 previously subleased the land without permission. Section 77-6-205, MCA. If no other
20 applications for the lease have been received 30 days prior to the expiration of the lease,
21 the incumbent lessee who has paid all rentals due the state is entitled to have the lease
22 renewed for a period not to exceed the maximum lease period provided by statute.
23 Section 77-6-205(1), MCA. The lessee requests the renewal at any time within 30 days
24 prior to the expiration of the lease. Id. “The renewal must be at the full market rental
25 rate established by the board for the renewal period and subject to any other conditions

1 at the time of the renewal imposed by law as terms of the lease.” Id. Additionally, “if
2 other applications have been received, the holder of the lease has the preference right to
3 lease the land covered by the former lease by meeting the highest bid made by any other
4 applicant.” Id. This statutory ability of the incumbent lessee is referred to as a
5 “preference right.”

6 “The board must accept the highest bid.” Section 77-6-205(2), MCA.
7 However, “[i]f the lessee exercises the preference right and believes the bid to be
8 excessive, the lessee may request an administrative hearing.” Id. The lessee’s request
9 “must contain a statement of reasons why the lessee believes the bid not to be in the
10 state’s best interest.” Id. If the Department determines that the statement indicates that
11 the bid may not be in the state’s best interests then the Department must grant the
12 request for a hearing. Id. After the hearing, the Board of Land Commissioners may
13 “reduce the rental from the amount bid if the lessee shows that the bid is not in the best
14 interest of the state because it is above community standards for a lease of the land,
15 would cause damage to the tract, or would impair its long-term productivity.” Id. If the
16 Board decides to reduce the bid, it must set forth its findings and conclusions in writing
17 and inform the lessee and competitive bidder of the reduction. Id. Finally, “[i]t is the
18 duty of the board to secure the best lessees possible, so that the state may receive the
19 maximum return possible with the least injury occurring to the land.” Id.

20 **The Preference Right Found in Section 77-6-205(1), MCA, is Unconstitutional**
21 **Because it Deprives the Trustee-land Board of Discretion to Choose the Best**
22 **Lessee for the Trust Lands.**

22 Statutes are presumed to be constitutional and it is the duty of the Court to
23 avoid an unconstitutional interpretation if possible. Montrust, ¶ 11 (citing State v. Nye,
24 283 Mont. 505, 510, 943 P.2d 96, 99 (1997)). “A party challenging the
25 constitutionality of a statute ‘bears the burden of proving the statute unconstitutional.

1 Any doubt is to be resolved in favor of the statute.” Montrust, ¶ 11 (citing State v.
2 Martel, 273 Mont. 143, 148, 902 P.2d 14, 17 (1995)). “A statute will be ‘upheld on
3 review except when proven to be unconstitutional beyond a reasonable doubt.”
4 Montrust, ¶ 11 (citing Davis v. Union Pacific R. Co., 282 Mont. 233, 239, 937 P.2d 27,
5 30 (1997)). In construing statutes, the intent of the legislature is to be pursued and that
6 intent is determined by interpreting the plain meaning of the language used by the
7 legislature. Montrust, ¶ 48. “The statutory language must be reasonably and logically
8 interpreted and words given their usual and ordinary meaning.” Id.

9 The constitutionality of the preference right of an incumbent lessee has
10 been challenged previously in Thompson v. Babcock, which pre-dated the current
11 statutory scheme and had an influence on its formulation. In Thompson, the incumbent
12 lessees rented a tract of state land for a rental rate of 25 percent of the crop share. 147
13 Mont. 46, 48, 409 P.2d 808, 809 (1966). At the time the lease was up for renewal,
14 Thompson submitted the high bid of 50 percent crop share. The Land Board notified the
15 incumbent lessees that they were entitled to meet the high bid. Id. Following a hearing,
16 the Board renewed the incumbent lessees lease at the old rental rate because of the
17 danger that the lessees would not fulfill the lease term due to an inability to make money
18 at the high rental rate or would cut corners on good husbandry practices. Id. at 49, 409
19 P.2d at 810. The court held that Thompson had petitioned the court for the wrong
20 remedy and denied any relief. Id. at 51, 409 P.2d at 810.

21 The court, however, went on to advise that an appropriate test of full
22 market value of a lease of state lands would be the value of a similar lease in the
23 particular community. Id. at 52, 409 P.2d at 811. The court determined that the
24 community value of a lease should be considered along with “the applicant’s ability as a
25 farmer, as well as other necessary variables which would have to be viewed in order for

1 the state to secure as large a return as possible, yet preserving the productive capacity of
2 the land.” Id. at 52-53, 409 P.2d at 811. The court recognized that “it is the Board’s duty
3 to get the best lessee possible, so the state may receive the maximum return with the
4 least injury occurring to the land.” Id. at 54, 409 P.2d at 812.

5 The court found that a fifty percent crop share bid was unrealistic for the
6 tract and that the state might lose money if the lease was allowed. Id. The court
7 acknowledged that the Board had experience with the incumbent lessees and that the
8 Board’s minutes reflected that Thompson owned no other land. Id. at 55, 409 P.2d at
9 813. The court concluded that the Board had exercised its discretion with regard to
10 Thompson and its final determination was not reached arbitrarily. Id. Finally, the court
11 emphasized that its decision did not preclude the application of the preference right
12 statute. “However, if . . . there is considerable discrepancy in the bids as well as the
13 character of the bidder, then the Board must utilize its discretion to determine what will
14 most benefit the public.” Id. at 56, 409 P.2d at 813.

15 Thompson recognized the Land Board’s duty to utilize its discretion to
16 determine what is most beneficial to the public. However, the current statute turns over
17 the discretion to renew a lease to the incumbent lessee. Section 77-6-205(1), MCA,
18 plainly states that “the holder of the lease has the preference right to lease the land
19 covered by the former lease by meeting the highest bid made by any other applicant.”
20 The statute gives the incumbent lessee the choice to exercise the preference right. If the
21 preference right is exercised, the lease goes to the incumbent lessee without any
22 deliberation by the Land Board as to whom the best lessee would be.

23 The letter from Bureau Chief Chappel to Broadbent evidences the absolute
24 nature of the preference right by stating that the “lessee has exercised their preference
25 right, therefore the lease will be issued to them. The only matter to be discussed at the

1 hearing is whether there should be any adjustment to the bid amount.” (Letter of March
2 25, 2003, from Kevin Chappel, Chief, Agric. & Grazing Mgmt. Bureau to Bill
3 Broadbent.) Because the preference right results in the issuance of the lease to the
4 incumbent lessee without any deliberation by the Land Board, the preference right
5 statute diminishes the Land Board’s duty as trustee of the school lands to administer it in
6 a manner most beneficial to the trust estate and in a manner that obtains the maximum
7 benefit in return from the use of trust property. See Okla. Educ. Ass’n v. Nigh, 642 P.2d
8 230, 236 (Okla. 1982) (holding the Oklahoma preference right statute, which did not
9 require the lessee to match the high bid, unconstitutional because it abridged and
10 impaired the trustees' freedom to function in the utmost good faith in the day-to-day
11 discharge of their public obligations as managers of the school land trust). Moreover,
12 the statute does not contain any language that could be construed to give the Land Board
13 any authority to conduct a hearing or perform an investigation to determine if the high
14 bidder would actually be a better lessee of the state land than the incumbent lessee.

15 Not only does Section 77-6-205(1), MCA, deprive the Land Board of its
16 discretion as trustee to determine who the best lessee of the state land would be, it also
17 operates to divide the trustee's loyalty between the beneficiaries of the school trust
18 lands and the incumbent lessee. The statute creates a situation where the Land Board
19 cannot choose a lessee who may actually improve the quality of the state lands, which
20 would benefit the beneficiaries. Rather, the statute creates a situation where the Land
21 Board has to accept the incumbent lessee as long as he or she has complied with the
22 prior lease terms and meets the high bid rate. The statute places the Land Board in the
23 situation where it has no choice but to renew the lease to the incumbent lessee, which
24 benefits the incumbent lessee but not necessarily the beneficiaries who may lose the
25 advantage of a high bidder who will have less impact on the state land. In effect, the

1 interest of the incumbent lessee in renewing the lease takes priority over securing
2 the best lessee for the trust.

3 The State argues that the preference right statute does not deprive the
4 beneficiaries of the largest measure of legitimate advantage because the incumbent
5 lessee is obligated to meet the high bid rate. However, the highest bid rate is only half
6 of the equation. Obtaining the lessee who will utilize the best management techniques is
7 another measure of legitimate advantage to the beneficiaries. The plain language of the
8 statute deprives the Land Board of the discretion to provide the maximum return with the
9 lease injury to the trust estate.

10 Broadbent argues that the preference right should be interpreted in a
11 discretionary manner rather than as an absolute right. Broadbent suggests that Thompson
12 would permit the preference right to be interpreted as discretionary because Thompson
13 states that the Land Board must utilize its discretion when there is considerable
14 discrepancy between the amount of the bids and the quality of the bidders. Thompson,
15 147 Mont. at 56, 409 P.2d at 813. Broadbent also offers the Arizona case of Campbell
16 v. Muleshoe Cattle Co., 212 P. 381 (Ariz. 1923) (hereinafter Muleshoe) for the
17 proposition that the preference right can be read in a discretionary manner.

18 In Muleshoe, the Muleshoe Cattle Company applied to renew its lease of
19 state land. Shilling filed for an original lease of the same tract. Following a hearing, the
20 state land department ordered that the lease be given to Shilling. Id. at 381. Muleshoe
21 brought a suit in mandamus to compel the state land department to execute the lease to
22 it. The Enabling Act of Arizona and the Arizona Constitution provided that the land board
23 had to obtain the highest and best bidder for state lands at public auction after advertising
24 of the available the lease. Id. at 382. An Arizona statute provided that in the case of two
25 or more applicants, the commissioners were to approve the application of the one who,

1 after investigation or hearing, shall appear to have the best right to such lease. Id. An
2 incumbent lessee was entitled to a “preferred right of renewal” in the lease. Id. The
3 court construed these two provisions of the statute together and determined that “the
4 preferred right of renewal given to the lessee is not an exclusive or absolute right, but is
5 used in the relative sense of ‘better’ or ‘superior’ right and implies a hearing or
6 investigation to determine the quality of such right.” Id. at 384.

7 The Muleshoe court’s conclusion that the statutory preference right
8 should be read as a better or superior right and not an absolute right cannot be reached
9 here. The Arizona statutes expressly provided for a hearing or investigation when two
10 applicants were competing for a lease. There is no such express provision in Montana’s
11 statutory scheme, nor can one be read into Section 77-6-205, MCA, without torturing
12 the plain meaning of the statute.

13 The only hearing discussed in Section 77-6-205, MCA, is for the purpose
14 of determining whether the high bid rate should actually be required from the renewing
15 lessee. Subsection (2) of that statute states: “If the lessee exercises the preference right
16 and believes the bid to be excessive, the lessee may request an administrative hearing. . .
17 . The department shall grant the request for a hearing if it determines that the statement
18 indicates evidence that the bid may not be in the state's best interests.” The lessee
19 requests the hearing for the purpose of reducing the rental rate. The plain language of
20 the statute establishes a hearing only for the purpose of evaluating the rental rate. It does
21 not permit an interpretation of the hearing to include an investigation into who would be
22 the best lessee.

23 The Court cannot avoid an unconstitutional interpretation of Section 77-6-
24 205(1), MCA, because it deprives the Land Board, as trustee of the school trust land, of
25 its discretion to obtain the best lessee possible for the trust; it divides the trustees

1 loyalty between the trust beneficiaries and the incumbent lessee and; it cannot be read to
2 require a hearing or investigation by the Land Board to determine the best lessee when
3 an incumbent lessee exercises the preference right. The Court holds that the preference
4 right provision of Section 77-6-205, MCA, requires the Land Board to manage the
5 school lands trust in a manner that is inconsistent with its fiduciary obligations of
6 undivided loyalty and the obligation to secure the largest measure of legitimate
7 advantage to the trust beneficiaries. All other aspects of Section 77-6-205, MCA, that
8 rely on the preference right provision are invalid due to the unconstitutionality of the
9 preference right. The Court notes that the invalidation of the preference right disposes
10 of the argument that the preference right violates the constitutionally mandated ten-year
11 limit on grazing leases.

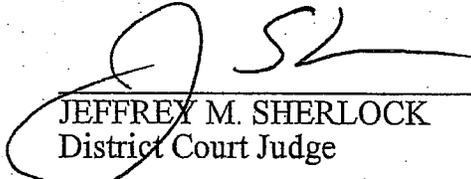
12 Because the Land Board based its decision to re-lease the state land to the
13 Harlows on an unconstitutional statute, that decision prejudiced the substantial rights of
14 Broadbent. Therefore, the decision of the State Board of Land Commissioners to
15 reissue Lease No. 9904 to Gale and Andrea Harlow is HEREBY REVERSED and
16 REMANDED to the Land Board for a determination of who the best lessee for the state
17 land will be.

18 **Attorney's Fees**

19 Broadbent requests recovery of his costs and attorney's fees under the
20 "private attorney general" doctrine. The matter has not been briefed to the Court.
21 Therefore, Petitioner's request for attorney's fees is DENIED.

22 DATED this 15 day of July, 2004.

23
24
25


JEFFREY M. SHERLOCK
District Court Judge

1 pc: Harley R. Harris
2 Tommy H. Butler/Mark C. Phares
3 Charles R. Johnson
4 John E. Bloomquist/Suzanne Taylor

5
6
7
8
9
10 T/JMS/BROADBENT V STATE (HARLOW) ORD PET J REVIEW.WPD
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25