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Senator Robert R. Story, Jr.
133 Valley Creek Road
Park City, MT 59063-8040

Dear President Story,

I am writing in response to your request for an opinion regarding whether the Board of Land Commissioners (Land Board) has authority to purchase land using proceeds from the approximately $41 million (plus interest) in compensatory damages from the Montana Supreme Court's recent decision in *PPL Montana, LLC v. State,* 2010 MT 64. As part of your request, you desired an analysis of the land banking process, the Legislature's appropriation power, and an analysis of the Legislature's ability to cancel any purchases that are made by the Land Board. This memo covers numerous topics, all of which are related to your primary question regarding the Land Board's authority.

FACTS

In *PPL Montana, LLC v. State,* 2010 MT 64, the Montana Supreme Court determined that title to the riverbeds of the Missouri, Clark Fork, and Madison Rivers passed to Montana when it became a state in 1889. However, the Court also reversed the District Court's conclusion that the riverbeds are "school trust lands" and instead held that they are public trust lands under Article X, section 11, of the Montana Constitution. As part of the decision, the Court upheld the District Court's methodology of calculating damages, and PPL Montana (PPL) was ordered to pay approximately $41 million (plus interest) in compensatory damages to the state for improper use of the riverbed.

On May 17, 2010, the Land Board adopted a resolution entitled Resolution of Montana Board of Land Commissioners for Disposition of Award of Compensatory Damages in *PPL Montana LLC v. State of Montana* and Preliminary Approval for Acquisition of Lands to be Held in Trust (attached for reference as Exhibit A). Paragraphs three and four of the resolution provide as follows:

> 3. Directs that when the judgment in the litigation is paid by PPL Montana, the entire amount of the compensatory damages, including all postjudgment interest, be deposited in a State Special Revenue Fund under M.C.A. §17-2-102(1)(b)(1)[sic], with instructions to invest the fund with the State Board of Investments and retain all earnings from the investment. The principal and all interest earned on the investment of the fund is to be available consistent with M.C.A. §17-8-101, for the restricted purpose of the acquisition of lands to be held in trust for the common schools beneficiaries by the Board of Land Commissioners. This special revenue fund is secured for the public land trust

managed by the Board from non-state, non- federal money, from the judgment entered by law in PPL Montana v. State, 2010 MT 64.

4. Directs the disbursal of compensatory damages from the special revenue trust account will be made only upon final approval of the Board of Land Commissioners for the acquisition of additional lands to be held in trust for the support of education for common schools.

The Land Board's resolution specifically labels the damages and interest as "non-state, non-federal money", and it envisions disbursal of the damages to purchase additional state land. A FAQ sheet from the Department of Natural Resources and Conservation (DNRC) (attached for reference as Exhibit B), provides as follows:

Is any expenditure exempt from appropriation in Montana?

Yes, money from non-state, non-federal sources that is restricted by law or trust agreement has been determined by the legislature to be exempt from appropriation.

Is the compensatory damage award from a non-state source?

Compensatory damages will come directly from PPL Montana--no state source money is to be used to compensate the trust. The payment is further subject to fiduciary management by the Land Board as part of the public land trust.

In other words, the Land Board's position is that it has authority to expend the damages and interest on a land purchase without an appropriation from the Legislature, as it is classifying the money as "non-state" revenue.

As it stands, PPL is determining whether it is going to appeal the Montana Supreme Court's decision to the United States Supreme Court. We should know by late June or sometime in July whether PPL appeals to the United States Supreme Court.[1] In the event it does appeal, we may not know if the United States Supreme Court accepted the case until October of this year. If an appeal is accepted the damages could remain unpaid for a period of time, which could give the

[1] Pursuant to United States Supreme Court Rule 13, a petition for a *writ of certiorari* to review a judgment in any case, civil or criminal, entered by a state court of last resort is timely when it is filed with the Clerk of the United States Supreme Court within 90 days after entry of the judgment. A petition for a *writ of certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. As applied here, the decision was issued on March 30, 2010, discretionary review was not requested, and the Montana Supreme Court closed the case on April 23, 2010. Consequently, a petition to the United States Supreme Court could be required as early as June 28, 2010, or as late as July 22, 2010.

Legislature the opportunity to direct the deposit and subsequent expenditure of the funds. Conversely, if PPL does not appeal or an appeal is quickly denied, the damages could be received by the state prior to the 2011 Legislative Session.

SUMMARY

This memorandum provides a general overview of Montana's Enabling Act, as well as the relevant provisions of the Montana Constitution in regards to the state's role as trustee of state lands. A basic understanding of Montana's obligations under these laws is essential to understanding how the state's obligation as trustee varies, depending on the type of land involved. A review of the Land Board's Constitutional and statutory power is also presented, and ultimately a determination is made that the Land Board does not have express authority to expend the compensatory damages at issue. Had the Land Board complied with the Legislature's mandate to lease the riverbeds, all of the income was required to be expended for the support and maintenance of a state institution. It would have been impermissible for the Land Board to purchase land using this income. Likewise, it is impermissible for the Land Board to label the damages as nonstate money that is not subject to the Legislature's appropriation power. Indeed, nonstate money refers to items such as private gifts or donations, funds from political subdivisions for purposes of investment and administration, and funds from escheated estates.

After concluding that the Land Board does not have the authority to expend the compensatory damages, a brief analysis of the DNRC's position is presented. The Legislature has the authority to expend the compensatory damages for the support and maintenance of any state institution so long as it does so pursuant to general laws and in the utmost good faith in considering beneficiaries and is not acting in its own interest or the interest of a third party. Based on a review of prior acts, the Legislature may want to consider the fact that prior legislation dating back to the 1930s treated the riverbeds as being held in trust for the benefit of the public schools. However, the Legislature is free to expend the damages for the support of other institutions. Before any decisions are made, the general fund is a proper place to hold the compensatory damages.

Lastly, this memorandum covers whether the Legislature can enact legislation to cancel the proposed land purchase if the Land Board goes forward as planned, in addition to other potential remedies at the Legislature's disposal. In the event the Legislature tries to invalidate a land purchase, it could face a legal challenge from the seller based on the contract clauses of the U.S. Constitution and the Montana Constitution. As such, the Judicial Branch is the best forum for resolving this issue, and the Legislature or a proper committee may wish to pursue an injunction or a declaratory judgment. In the event court action is not pursued, then the Legislature can direct the Land Board to sell any acquired lands from the damages and distribute the proceeds to qualifying beneficiaries.

ANALYSIS

A. RESTRICTIONS IMPOSED BY THE ENABLING ACT AND THE MONTANA CONSTITUTION.

1. The Advent of School Trust Lands and Montana's Enabling Act.

The idea of granting lands to the states for the support of education goes back as far as the American Revolution. Through the General Land Ordinance of 1785, Congress provided for the rectangular survey, and a program was initiated to reserve lot number sixteen in every township for the maintenance of public schools.[2] In 1803, Ohio became the first state to receive a school land grant, and it was to be used "for the maintenance of schools".[3] Since, then twenty-five of the lower forty-eight states, including Montana, were admitted into the union "through acts of admission, organic acts, or enabling acts".[4] Each of these acts contained the purpose for which land was granted.

Montana's statehood was obtained by an omnibus enabling act (The Enabling Act)[5], whereby North Dakota, South Dakota, and Washington were also admitted as states. As part of The Enabling Act, Montana was granted 5,198,258 acres of state trust land,[6] which was to be used for: (1) support of the common schools; (2) state government buildings at the capitol; (3) university purposes; (4) a penitentiary; (5) support of an agricultural college; (6) a school of mines; (7) normal schools; (8) a reform school; and (9) an asylum.[7] The level of restrictions Congress imposed on the land varies based on the purpose of the land grant. As far as common schools are concerned, the federal government granted Montana the sixteenth and thirty-sixth sections of each township in Montana "for the support of common schools".[8] The federal government's grant constitutes a trust.[9] Pursuant to The Enabling Act, the proceeds from the sale or permanent disposition of common school land must be treated as "permanent funds for the support and maintenance of the public schools".[10] Moreover, "none of such lands . . . shall ever be disposed of . . . unless the full market value of the estate or interest disposed of, to be

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[2] Sally K. Fairfax, Jon A. Souder, & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 805 (1992).
[3] *Id.* at 798, 818.
[4] *Murphy v. Arizona*, 181 P.2d 336, 350 (Ariz. 1947). Through these acts of Congress, the legislatures of twenty-three of these states were given authority and control over the proper disposition of granted lands. These twenty-three states are Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.* at 350-51. The Enabling Act for New Mexico and Arizona was more restrictive. *See id.*
[5] Act of February 22, 1889 (hereafter, Enabling Act), Ch. 180, 25 Stat. 676 (1889).
[6] Alex Sienkiewicz, *A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question*, 67 Mont. L. Rev. 65, 72 (2006).
[7] Enabling Act, §§ 10, 14, 15, 17.
[8] *Id.* § 10.
[9] *See Rider v. Cooney*, 94 Mont. 295, 306-07, 23 P.2d 261, 263 (1933).
[10] Enabling Act, § 11.

ascertained in such manner as may be provided by law, has been paid or safely secured to the State".[11]

As far as leases are concerned, The Enabling Act provides (subject to term of years restrictions) that all granted lands "may be leased under such regulations as the legislature may prescribe".[12] The "[r]entals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income" shall be available for acquisition and construction, the retirement of bonds, and for the maintenance and support of such schools and institutions.[13] However, the states were given discretion to add income to their permanent fund. There are no sections in The Enabling Act that require the usage of a Land Board, and management and control is left to the discretion of the Legislature.

The Montana Supreme Court has used three general principles, first expressed by the United States Supreme Court, to construe The Enabling Act:

> (1) Enabling acts created trusts similar to a private charitable trust, not to be abridged by the states;
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> (2) enabling acts are to be strictly construed according to fiduciary principles, and;
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> (3) enabling acts preempt state laws and constitutions.[14]

Having established that The Enabling Act can preempt the Montana Constitution when there is an inconsistency, the next step in the analysis is an overview of relevant Constitutional provisions.

2. Article X, Section 2, and the Public School Fund: Guarantee by the State Against Loss or Diversion.

Article X, section 2, of the Montana Constitution sets up a public school fund, which consists of (1) proceeds from the school lands which have been or may hereafter be granted by the United States, (2) lands granted in lieu thereof, (3) lands given or granted by any person or corporation under any law or grant of the United States, (4) ***all other grants of land*** or money made ***from the United States*** for general educational purposes or ***without special purpose***, (5) all interests in estates that escheat to the state, (6) all unclaimed shares and dividends of any corporation incorporated in the state, and (7) all other grants, gifts, devises or bequests made to the state for general educational purposes. Article X, section 3, then provides that this public school fund shall forever remain inviolate, ***guaranteed by the state*** against loss or diversion. When analyzing these two Constitutional provisions, it is clear that proceeds from the sale of school lands such as

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 369, 702 P.2d 948, 953 (1985) (citing *Andrus v. Utah*, 446 U.S. 500 (1980)).

those transferred to Montana by The Enabling Act are guaranteed by the state against loss or diversion. Likewise, if the state fails to properly manage lands that are part of the public school fund, it must account for the loss.

In *PPL Montana*, the state claimed that Montana's navigable riverbeds were part of the public school fund and were school trust lands pursuant to Article X, section 2(4), on the assumption that the riverbeds were grants of land made from the United States for general educational purposes or without special purpose.[15] The Montana Supreme Court rejected this argument based on a very technical reading of the relevant language.[16] First, the Court acknowledged that the word "grants" can be used as verb or as a noun.[17] Second, the Court determined that the term "grants" in the Constitution is used as "a noun and refers to the transfer of title to lands owned by the United States".[18] Given this interpretation, the riverbeds did not meet this definition, as they were not "***owned***" by the United States, but instead ***were held in trust*** by the United States for Montana until it became a state.[19] That is, all states were entitled to receive navigable riverbeds on admission to ensure that all states were on equal footing.

In summary, the riverbeds are not school trust lands for purposes of Article X, section 2. However, this does not end the analysis. As discussed in the next subsection, Article X, section 11, which governs all public trust land (including school trust lands), has implications.

3. Article X, Section 11: Public Trust Lands Generally.

The state has a Constitutional obligation to manage all state lands in accordance with the trust obligations imposed by Article X, section 11, of the Montana Constitution, which reads as follows:

> **Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.
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> (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
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> (3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except

[15] *PPL Montana*, ¶ 44-45.
[16] *Id.* ¶¶ 49, 115.
[17] *Id.* ¶¶ 48-49, 115-116.
[18] *Id.* ¶ 49, 115.
[19] *Id.* ¶ 49, 115-116.

in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Article X, section 11, makes it clear that nearly[20] all state lands are public lands that are held in trust for the people. Importantly, however, the terms of the public land trust vary based on the type of land that the state holds. Based on subsection (3), it is impermissible for the state to dispose of any land that was obtained by grant from the United States, including land from The Enabling Act, unless the terms of the land grant are followed. Similarly, based on subsection (1), it is impermissible for the state to dispose of any lands if it such action violates the terms of a private grant, gift, or devise (*i.e.* land that is restricted by terms of private trust). However, when the terms of the land grant, gift, or devise do not restrict a disposition, the state can dispose of an estate (*i.e.*, sale or partial sale of a real property interest) or interest (*i.e.* a lease), so long as the transaction is in pursuance of general laws providing for such disposition or the full market value of the estate or interest disposed of (as provided by law) has been paid or safely secured to the state.

In *PPL Montana,* PPL claimed that Montana's navigable riverbeds were not school trust lands but were instead public trust lands that are generally held for the benefit and use of all Montanans.[21] While addressing the issue, the Supreme Court determined that the riverbeds met the definition in Article X, section 11(1), as they were lands of the state that were transferred to Montana due to an action of Congress.[22] That is, title to the riverbeds passed to Montana through application of the equal footings doctrine when Congress passed The Enabling Act and Montana became a state.[23] As such, the Supreme Court held that the riverbeds are not school trust lands, but the Land Board is still required to comply with the trust obligations imposed by Article X, section 11, of the Montana Constitution.[24] While explaining its holding, the Court took notice that the Montana Water Resources Association, the Gallatin Agricultural Irrigators, and the Montana Farm Bureau Federation were concerned about the impact of the decision on their

[20] Section 77-1-101, MCA, provides that the term "state lands" does not include lands that the state conveys through the issuance of patent; lands that are used for building sites, campus grounds, or experimental purposes by a state institution and that are the property of that institution; lands that the board of regents of higher education has authority to dispose of pursuant to § 20-25-307, MCA; or lands acquired through investments under the provisions of § 17-6-201, MCA.
[21] *PPL Montana,* ¶ 44-45.
[22] *Id.* ¶¶ 50, 116.
[23] *Id.*
[24] *Id.* ¶ 117. The Supreme Court rejected the argument that the riverbeds were school trust lands on the theory that the Land Board could classify the lands as such pursuant to Article X, section 11(4), as it never attempted to classify them as such. *Id*. However, pursuant to Article X, section 11(4), classification is done in a manner provided by law. Title 77, chapter 1, part 4, MCA, is the law governing classification and does not grant the authority to classify land as school trust land.

ability to appropriate water.[25] However, the Court reiterated that the Legislature may pass "general laws" providing for the use of the state-owned riverbeds by various users of water.[26] In the case of PPL, the general law that was violated was the Hydroelectric Resources Act (HRA), which was used by the lower court to assess damages.[27] Yet, the Legislature may develop a more favorable assessment method for other water users after taking into account the "public trust" with respect to the various uses.[28]

In summary, the riverbeds are not school trust lands, but are public trust lands pursuant to Article X, section 11(1), of the Montana Constitution. The Montana Constitution makes it clear that none of this land "or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state".[29]

B. THE LAND BOARD'S AUTHORITY TO PURCHASE PROPERTY AND AN ANALYSIS OF WHERE LEASE PAYMENTS COULD HAVE BEEN EXPENDED IF THE LAND BOARD WOULD HAVE LEASED THE RIVERBEDS TO PPL.

1. The Land Board's Authority.

As discussed above, The Enabling Act does not require a Land Board or similar board for the administration of school trust lands or any other lands that were obtained from the federal government. Subject to a narrow Constitutional restriction for public school lands, the Legislature has the ultimate power to enact laws regarding administration of all public trust lands. Consequently, an analysis of the Land Board's Constitutional and statutory power is critical in resolving your question.

The Constitution generally provides that lawmaking is a function of the Legislature. Article V, section 1, of the Montana Constitution reads as follows:

> **Power and structure.** The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

However, a limited exception allows the exercise of power properly belonging to another branch when the power is expressly directed or permitted by the Constitution. Article III, section 1, of the Montana Constitution reads as follows:

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[25] *Id.* ¶ 170.
[26] *Id.*
[27] *Id.* (citing Title 77, chapter 4, part 2, MCA).
[28] *Id.*
[29] *Id.* ¶ 83 (quoting Article X, section 11(2)).

> **Separation of powers.** The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, ***except as in this constitution expressly directed or permitted***. (emphasis added).

Article X, section 4, of the Montana Constitution reads as follows:

> **Board of land commissioners.** The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. ***It has the authority to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law***. (emphasis added).

The interplay of the above Constitutional provisions is important when determining what level of Constitutional authority the Land Board has over state lands. As applied, the Land Board clearly has express authority to direct, control, lease, exchange, and sell ***school*** lands, but the manner in which the Land Board exercises its Constitutional authority can be restricted by the Legislature in a manner consistent with The Enabling Act and the Montana Constitution. Any power that the Land Board exercises over non-school land comes from the Legislature in the form of statutes and not from the Constitution.

Statutorily, the Legislature authorized the Land Board to "exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration."[30] The Department of Natural Resources and Conservation (DNRC), in turn, is under the direction of the Land Board and is charged with "selecting, exchange, classification, appraisal, leasing, management, sale, or other disposition of the state lands."[31] The "guiding principle" in the administration of Montana's trust lands is that "these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act".[32] The Land Board is required to administer the trust to secure the largest measure of legitimate and reasonable advantage to the state and provide for the long-term financial support of education.[33]

In the instant case, any authority the Land Board has over the approximately $41 million (plus interest) in damages must come from a grant of legislative authority, as Article X, section 4, of the Constitution relates to school lands. When analyzing the Land Board's authority under section 77-1-202(1), MCA, it is clear that it has general authority, direction, and control over the care, management, and disposition of "state lands". As such, it is not surprising that the

[30] § 77-1-202, MCA.
[31] § 77-1-301(1), MCA.
[32] § 77-1-202, MCA.
[33] § 77-1-202(1)(a)-(b), MCA.

Supreme Court held that the Land Board has a fiduciary duty to administer Montana's riverbeds in the public interest.[34] However, the statute does not specifically grant the Land Board any authority to expend or administer funds that were collected by the state based on a court judgment for past damages. Moreover, the Supreme Court did not attempt to determine whether the Land Board has a fiduciary duty over money that was recovered as "past damages". Instead, the Court acknowledged the ***state's right*** to seek compensation and affirmed the District Court's calculation of damages based on the HRA.[35]

Given the fact that the Land Board does not have any express legislative authority to exercise direction and control over any judgment proceeds, the Legislature is properly charged with the exercise of this power under Article V, section 1, of the Montana Constitution. However, this does not mean that the proceeds can be appropriated for any purpose. As discussed in further detail in part E, the judgment proceeds must be held in trust until they are properly expended at the direction of the Legislature.

2. Assuming that the Land Board Properly Leased the Riverbeds to PPL.

Assuming for sake of argument that the Land Board leased the riverbeds to PPL, the applicable provision of the HRA during the years at issue (2000-2007)[36] reads as follows:

> **Rental for power sites.** The rental to the state must be paid annually or semiannually and such rental shall not be less than the full market value of the estate or interest disposed of through the granting of the lease or license, such value to be carefully ascertained from all available sources.[37]

If we assume further that the Land Board complied with the Legislature's statutory mandate, then section 77-1-202, MCA, comes into play. This statute was amended by the 2005 Legislative Session, so two different mandates apply. From January 1, 2000, to June 30, 2005, the applicable provisions of the statute read as follows:

> … In the exercise of these powers, the ***guiding principle*** is that these lands and funds are held in trust ***for the support of education and*** for the attainment of ***other worthy objects helpful to the well-being of the people of this state*** as provided in The Enabling Act. The board shall administer this trust to secure the ***largest measure of legitimate and reasonable advantage to the state.*** (emphasis added).

From July 1, 2005, to December 31, 2007, the statute contained a provision regarding the long-term financial support of education, and it read as follows:

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[34] *See PPL Montana*, ¶ 170.
[35] *Id.* ¶¶ 144, 172.
[36] *PPL Montana*, ¶ 141.
[37] § 77-4-208, MCA (2007).

> … In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:
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> (a) secure the largest measure of legitimate and reasonable advantage to the state; ***and***
>
> (b) ***provide for the long-term financial support of education.*** (emphasis added).

Both versions of the statute provide that funds are to be used for education ***or*** other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The plain language of this sentence permits spending on education in general and not simply the public schools. Moreover, it permits spending for the "well-being of the people of this state", as provided in The Enabling Act, which could be construed to mean support for the common schools, state government buildings at the capitol, university purposes, a penitentiary, an agricultural college, a school of mines, normal schools, a reform school, and an asylum, all of which were objects of The Enabling Act.[38]

The provision that was added by the 2005 Legislature regarding the long-term financial support of education is a duty that the Land Board already had. For example, it would be a clear violation of The Enabling Act and the Montana Constitution if the Land Board sold school trust lands and expended all of the money instead of placing it in the public school fund.[39]

It is clear that the Land Board had discretion under both versions of section 77-1-202, MCA, to choose a beneficiary. However, this does not mean that the Land Board had the authority to place the money in the permanent public school fund or use the money to purchase land. Section 17-3-1003, MCA, as in effect during the years at issue, provided that for the support and endowment of each state institution, there is annually and perpetually appropriated, after any deductions for allowable administration expenses, "***the income from*** all permanent endowments for the institution and from ***all land grants as provided by law***".[40] When the income came from the leasing of lands granted to a state institution, it was to be deposited with the state treasurer of Montana for each institution, to the credit of the state special revenue fund.[41] As applied here, the riverbed income was not granted to a specific state institution or entity, such as the public schools. Consequently, pursuant to the guiding principles of section 77-1-202, MCA, the Land Board had discretion to determine which state institutions were entitled to receive "the income" from the leases. After making this determination, the state treasurer, by virtue of the annual and

[38] Enabling Act, §§ 10, 14, 15, 17.

[39] Section 11 of The Enabling Act provides that the proceeds from the sale or permanent disposition of common school land shall be treated as "permanent funds for the support and maintenance of public schools". Moreover, Article X, section 3, of the Constitution provides that the "public school fund shall forever remain inviolate".

[40] *See* § 17-3-1003(1), MCA (2003). Chapter 465, Laws of 2009, substantially revised trust funding laws. Section 77-1-101(4), MCA, now provides, subject to certain restrictions for school and capitol building land grants that "distributable revenue" includes the income received from the leasing, licensing, or other uses of state trust land. Section 77-1-109(3), MCA, in turn, generally provides that after statutory land administration costs are covered, distributable revenue must be deposited in accordance with § 17-3-1003, MCA.

[41] *See* § 17-3-1003(2), MCA (2003).

perpetual appropriation in section 17-3-1003, MCA (2003), was required to deposit the funds to the credit of the institution in the state special revenue fund. However, pursuant to section 17-3-1004, MCA, these funds would have been legally restricted to the payment of claims for expenses actually incurred for the support and maintenance of the institution. It would have been impermissible for the institution or the Land Board to purchase land. Additionally, it would have been impermissible to use any general fund appropriations that were earmarked for the maintenance of the institution until the income funds were exhausted.[42]

Having established where the Land Board should have applied the riverbed lease money, another question to be answered is whether the Land Board had discretion to place the riverbed rent money in a land banking account or to place it in the permanent public school fund. The land banking program implements Article X, section 11(4), of the Montana Constitution regarding land exchanges and was enacted in 2003. Section 77-2-361(2), defines "land banking" as a process of selling various parcels of state land and using the proceeds from the sales to purchase other land, easements, or improvements that are likely to provide greater or equal trust revenue, as may be reasonably expected over a 20-year accounting period with an acceptable level of risk, for the affected trust and to diversify the land holdings of the various trusts. In essence, "land banking" is a form of a deferred land exchange. Section 77-2-362, MCA, creates the state land bank fund. The proceeds from the sale of state trust land authorized by sections 77-2-361 through 77-2-367, MCA, must be deposited into the state land bank fund. The purpose of the state land bank fund is to temporarily hold proceeds from the sale of trust land pending the purchase of other land, easements, or improvements for the benefit of the beneficiaries of the respective trusts. There is nothing in the statute that provides that the state land bank fund may be used to hold income for the purposes of purchasing land or that allows for the deposit of any money other than the proceeds of state trust land in the state land bank fund.

Similarly, it would have been impermissible for the Land Board to place the riverbed rent money into the permanent public school fund. Article X, section 2, of the Montana Constitution creates the public school fund, and section 20-9-601, MCA, is the statutory provision that memorializes this fund. As previously discussed, the riverbed lands are not Article X, section 2, public school lands. Section 20-9-601, MCA, does not change this analysis; it simply recaps the requirements of Article X, section 2, while classifying appropriations and donations by the state and money provided by the Legislature to the list.

In conclusion, I am unaware of any legislative authority from 2000 to 2007 that would have allowed the Land Board to use the riverbed lease money for any purpose other than for the support and maintenance of public institutions, as provided in section 17-3-1003, MCA (2003). Apparently, the Land Board's position is that the failure to fulfill statutorily prescribed fiduciary duties gives it a legal basis to do what it could not do if it had complied with these duties.

[42] § 17-3-1004(2), MCA.

C. THE LEGISLATURE'S APPROPRIATION POWER IS BROAD.

An appropriation is authority, derived from the Legislature, for a governmental entity to expend money from the state treasury for a specified public purpose.[43] Based upon the analysis in this section, an appropriation is required in order for a state entity to expend money from the state treasury unless the money is from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation.

Article VIII, section 14, of the Montana Constitution, provides:

> Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.

The scope of the legislative appropriation power under the 1972 Montana Constitution was determined in 1975 in the companion cases of *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975), and *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

The Court in *Board of Regents* noted that the 1972 Montana Constitution had broadened the scope of the appropriation power. Previous court decisions had limited the scope of the appropriation power to the general fund.[44] The Court cited Article VI, section 9, requiring the Governor to submit to the Legislature a budget "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state", Article VIII, section 9, concerning a balanced budget, and Article VIII, section 12, requiring strict accountability of revenue and expenditures. The Court said:

> Thus the legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government.[45]

Consistent with the Court's opinion, section 17-8-101, MCA, provides that for purposes of complying with Article VIII, section 14, of the Montana Constitution, money deposited in the state general fund, the special revenue fund type (***except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement***, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of certain statutorily authorized refunds, may be paid out of the treasury only on appropriation made by law.

Subject to certain limitations, money deposited in the enterprise fund type, debt service fund type, internal service fund type, private purpose trust fund type, agency fund type, and state special revenue fund from nonstate and nonfederal sources restricted by law or by the terms of

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[43] *See State ex rel. Haynes v. District Court*, 106 Mont. 470, 78 P.2d 937 (1938).
[44] *State ex rel. Aeronautics Comm'n v. Bd. of Examiners*, 121 Mont. 402, 194 P.2d 633 (1948), *overruled in Bd. of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975); *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 (1921), *overruled in Bd. of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).
[45] *Board of Regents*, 168 Mont. at 446.

an agreement, such as a contract, trust agreement, or donation, may be paid out of the treasury by appropriation or under general laws or contracts entered into in pursuance of law permitting the disbursement if a subclass is established on the state financial system.

To date, the Land Board has classified the compensatory damages and interest as "non-state, non-federal money" that is exempt from appropriation under Article VIII, section 14, and section 17-8-101, MCA. The primary question, then, is how can money received by the State of Montana from PPL for violation of state land laws be considered nonstate money? There are no Montana Supreme Court cases that explicitly define the term nonstate money. However, the *Board of Regents* decision touched upon the subject when the Court emphasized that "***the power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement or contract"***.[46] As an example, the Court cited to the Montana Trust and Legacy fund, which was established by Article XXI of the 1889 Constitution.[47] In a 1964 Montana Supreme Court decision, the Montana Trust and Legacy Fund was described as follows:

> (1) Permanent funds created from *inter vivos* or testamentary donations from natural persons (the "state permanent revenue fund," "state permanent school fund," and "permanent revenue fund for the University of Montana"). (Section 1, Article XXI, [1889] Constitution of Montana);
>
> (2) Funds created from donations by natural persons earmarked for particular scientific, educational, benevolent and charitable work (Section 1, Article XXI, [1889] Constitution of Montana);
>
> (3) The public school permanent fund and other permanent funds, subject to investment, originating in land grants from the United States for the support of educational and other state institutions (Section 6, Article XXI, [1889] Constitution of Montana);
>
> (4) Funds of political subdivisions when accepted by the state for the purposes of investment and administration (Section 7, Article XXI, [1889] Constitution of Montana);
>
> (5) Escheated estates not transferred to the public school permanent fund (R.C.M. 1947, § 79-1202 [repealed by Ch. 298, Laws of 1973]); and

[46] *Id.* (emphasis added).
[47] *Id.* at 446-47.

(6) All other public funds subject to long term investment when not by law administered by another repository (R.C.M. 1947, § 79-1202 [repealed by Ch. 298, Laws of 1973]).[48]

The extent of appropriation power was analyzed further in a 1976 Montana Attorney General Opinion, where it was determined that control over the ultimate disposition of gifts to the Montana School for the Deaf and Blind could be utilized without a specific appropriation.[49] Based on the above authority, the term "nonstate" or private funds can be construed to mean private gifts or donations, funds from a political subdivision that are accepted for the purposes of investment and administration, and funds from escheated estates (*i.e.*, as provided in Article X, section 2(5), of the Montana Constitution).

As applied here, the compensatory damages are unquestionably not a gift or donation to the state from PPL. It is also clear that the funds are not derived from a political subdivision or from an escheated estate. Consequently, it is difficult to fathom how money received by the state of Montana for violation of a state law pertaining to "state-owned lands" can be considered "nonstate" money.[50] It is currently DNRC's position that the compensatory damages "will come directly from PPL Montana--no state source money is to be used". Yet, money frequently goes to the state treasury from other parties, including taxpayers. The fact that money is derived from a nonstate entity does not turn the money into private funds. Similar to taxes, the compensatory damages are payable to Montana based on state law.

D. OVERVIEW OF DNRC'S POSITION IN THE FAQ SHEET.

As it stands, our legal services office has yet to receive a legal opinion from DNRC in defense of the Land Board's resolution dated May 17, 2010. However, the FAQ sheet from the DNRC gives summary responses to certain questions, and it is my understanding that DNRC is working on a legal opinion. As an overriding theme, the DNRC frequently mentions that the damages were meant to "make the trust whole" and provide for current and future beneficiaries. Nevertheless, the Supreme Court never discussed making the trust whole. The corpus of the trust in this case is the riverbeds, which have not been sold to PPL. In other words, the trust was never diminished and is already whole for future beneficiaries who will be entitled to receive the full amount of the rent payments. It is the past and present beneficiaries who did not receive an ongoing stream of revenue, which in turn placed more financial pressure on the state. If the Land Board would have collected this money from the start, then the law required it to be used in its entirety for

[48] *In re Montana Trust and Legacy Fund*, 143 Mont. 218, 221-222, 388 P.2d 366, 368 (1964) (advisory opinion). The terms "restricted by law, trust agreement or contract", as stated in *Board of Regents*, logically extends to the public school permanent fund and other permanent funds originating in land grants from the United States, as well as certain public funds that are required by law to be invested long term, and liquidity is nonexistent. In *State ex rel. Missoula v. Holmes*, 100 Mont. 256 (1935), the Montana Supreme Court, in construing Article XXI of the 1889 Constitution, reasoned that "liquidity is practically destroyed" in the long-term investment plan. It further reasoned that "Article XXI throughout contains the legislative as well as the constitutional safeguards against the loss so far as possible to the permanent funds of the state."

[49] 36 A.G. Op. 106 (1976).

[50] *See PPL Montana*, ¶ 170.

expenses actually incurred for the support and maintenance of a state institution, as described in part B.2 of this memorandum.[51] Consequently, placing the compensatory damages in a permanent fund category actually harms the past and present beneficiaries, which could lawfully include any state institution.

The DNRC also stated that Article X, section 11, of the Montana Constitution gives the Land Board broad authority to manage Public Land Trust assets for the long-term benefit of education. However, as noted in part B.1 of this memorandum, any authority that the Land Board derives over the riverbeds comes from the Legislature and not the Constitution. Section 77-1-116, MCA, is the only statute that is cited in support of its claim, which provides as follows:

> **Additional penalty.** In addition to the penalties provided for in this code against those committing trespass upon any of the lands owned or held in trust or otherwise by the state, the board is hereby authorized and empowered, without legal process, to seize and take or cause to be seized and taken any and all lumber, wood, grass, or other property unlawfully severed from the lands, whether the same has been removed from said lands or not, and may dispose of the same at either public or private sale in such manner as will be most conducive to the interests of the state, and all moneys arising therefrom, after deducting the reasonable and necessary expenses of such seizure and sale, shall be a part of the permanent fund to which such lands may belong.

In citing section 77-1-116, MCA, DNRC states that it "provides guidance when trespass upon stated lands held in trust occurs—the Board is authorized and empowered to seize any property unlawfully taken [here the riverbed use] dispose of it and all money generated from the property [here the compensatory award] and 'make it part of the permanent fund to which such lands may belong'". However, based on a plain reading of section 77-1-116, MCA, it simply provides a mechanism for selling property that was severed from the land. Riverbed "use" is clearly not "property". Whatever "guidance" the DNRC gains from section 77-1-116, MCA, clearly does not rise to authorization by the Legislature to do what the Land Board proposes.

As far as case law is concerned, the Land Board resolution cites to *Montanans for Responsible Use of School Trust v. Darkenwald*, 2005 Mont. 190, 328 Mont. 105, 119 P.3d 27 (2005), for the proposition that "the Land Board must manage the public land trust for the support of education generally and to benefit both current and future beneficiaries of the trust". The *Darkenwald* case involved a challenge to Senate Bill No. 495 from 2001, which authorized the DNRC to borrow up to $75 million from the coal trust severance tax permanent fund for 30 years to buy mineral production royalties owned by the public school fund in order to enhance short-term distributable revenue from the public school fund for the benefit of public schools. The plaintiff asserted that this statutory scheme violated the state's school trust duties by using an arbitrary method of determining the appropriate discount rate and by not requiring an independent appraisal to determine full market value of the future royalty stream. The District Court concluded that the state's method of determining the appropriate discount rate was neither

[51] *See* §§ 17-3-1003, (2003); 17-3-1004, MCA.

arbitrary nor a breach of the duty to obtain fair market value, and on appeal, the Supreme Court affirmed that the discount rate was reasonable and reflected the full market value of the future stream of mineral royalties. Additionally, an independent appraisal was not necessary because when the state sells only an estate or interest in land, the state has ample power to determine the method by which to ascertain the full market value of the estate or interest. The Land Board bears the task of ensuring that the trust receives full market value for state land interest, and the Supreme Court declined to substitute its opinion for that of the Land Board unless the action is arbitrary. The plaintiff failed to show that the financing scheme in Senate Bill No. 495 was unconstitutional beyond a reasonable doubt, and the Supreme Court affirmed that the state, by balancing the interests of present and future beneficiaries of the school trust through Senate Bill No. 495, fully complied with the Montana Constitution, The Enabling Act, and state statutes and thus did not violate its trust duties.

As described, *Darkenwald* addressed a disposition of an interest in the public school fund, which is subject to The Enabling Act and guaranteed against loss and diversion under the Montana Constitution. The riverbeds, on the other hand, are not part of the public school fund, they are not subject to The Enabling Act, and there is no Constitutional guarantee against loss or diversion. As such, the *Darkenwald* facts are inapposite to the facts of *PPL Montana*. Additionally, it should be noted that in *Darkenwald* the functions of the Land Board were to determine whether to sell the mineral production royalties and to determine the fair market value of the mineral royalties. The balancing of the present and future beneficiaries was done in the authorizing legislation and not by the Land Board on its own volition. Therefore, it is certainly appropriate for the Legislature to balance the interests of present and future beneficiaries with regard to compensatory damages, but the Land Board does not have the authority to engage in this balancing function.

E. THE LEGISLATURE'S ROLE IN THE EVENT THE LAND BOARD DOES NOT EXPEND THE DAMAGES PRIOR TO THE NEXT SESSION.

1. Montana's Obligation as a Trustee.

Since the LandBoard does not have explicit Constitutional or statutory authority to expend the compensatory damages arising from the *PPL Montana* decision, the Legislature may desire to consider how it can appropriate the money in the event the Land Board does not expend it before the next session. Article X, section 11, of the Montana Constitution imposes a trust obligation on the state, which includes the Legislature. The riverbeds are held in trust for the people and cannot be disposed of except in pursuance of general laws providing for such disposition or until the full market value of the estate or interest disposed of, to be ascertained in such as manner as may be provided by law, has been paid or safely secured to the state. In *Wild West Motors, Inc. v. Lingle*, 224 Mont. 76, 728 P.2d 412(1986), the Montana Supreme Court considered a trustee's duty of undivided loyalty and concluded:

> When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts

> which require a standard with a "punctilio of an honor the most sensitive." A 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.[52]

The "essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property do so 'subject to the trust.'"[53]

Based on the analysis in parts A & B.2 of this memorandum, the damages can be expended by the Legislature for the support and maintenance of any state institution without any impediments from The Enabling Act or the Montana Constitution. However, the Legislature, as a trustee, would need to act in the utmost good faith in considering beneficiaries and not act in its own interest or the interest of a third person. As part of this duty, the Legislature could determine whether it desires to completely expend the compensatory damages or if it desires to allocate some or all of the money to a permanent investment. When making these determinations, the Legislature may wish to consider legislative intent from prior sessions.

Dating back to 1895 and continuing today, the state has recognized that it has an ownership interest in all land below the water of a navigable lake or stream.[54] In 1931, the Legislature enacted the Hydroelectric Resources Act (HRA), which was used by the Montana Supreme Court in *PPL Montana* as a basis for calculating damages.[55] The HRA specifically limits the duration of a power site lease to 50 years.[56] This requirement matches a requirement in The Enabling Act that states "leases for development of hydroelectric power shall be for a term not longer than fifty years".[57] Six years later, the Legislature enacted Chapter 36, Laws of 1937, which is codified at sections 77-1-102, 77-1-103, and 77-1-104, MCA. These sections generally provide that when a riverbed changes course, all lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake belong to the state of Montana to be held in trust for the benefit of the public schools of the state. Recently, the 2009 Legislature amended the HRA so that beginning January 1, 2012, 95% of all rental payments are deposited in the school facility and technology account, with the remaining 5% of the rental payments being deposited in the public school permanent fund.[58] It seems clear that the 1931, 1937, and 2009 Legislatures believed navigable riverbeds were subject to The Enabling Act and held in trust for the benefit of the public schools. However, the Legislature is not bound by these prior determinations, and it can change the law that was enacted in 2009 by directing money from power site leases to another beneficiary or an account that is not permanent in nature.

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[52] *Wild West Motors*, 224 Mont. at 82, 728 P.2d at 415-16 (citations omitted).
[53] *Pettibone*, 216 Mont. at 375, 702 P.2d at 956-57 (citations omitted).
[54] *See* § 70-1-202(1), MCA (originally enacted in 1895 and subsequently reenacted in 1907, 1927, and 1935), which provides that the state is the owner of all land below the water of a navigable lake or stream. Almost 100 years after the original enactment of this law, the Montana Supreme Court in *Dept. of State Lands v. Armstrong*, 251 Mont. 235, 824 P.2d 255 (1992), recognized that the ownership of two tracts of land that were discernible Missouri River islands prior to attaching to adjoining lands were properly claimed by the state and that the property boundary line shifts with the waterline.
[55] Chapter 123, Laws of 1931; *PPL Montana*, ¶¶ 144, 172.
[56] § 77-4-209, MCA.
[57] The Enabling Act, § 11.
[58] § 77-4-208(2), MCA; section 22, Chapter 377, Laws of 2009; section 32, Chapter 486, Laws of 2009.

2. Where the Damages Can Be Held in Trust.

Section 17-2-102, MCA, requires strict accountability for all revenue received and spent, and various fund types are set up for this purpose. There are four main categories of funds, including governmental, proprietary, fiduciary, and higher education. Under section 17-2-102(1), MCA, the general fund, state special revenue, and federal special revenue are classified as part of the governmental fund category. The general fund accounts for all financial resources except those required to be accounted for in another fund. It is essentially the default fund when the Legislature does not address where money should be deposited.[59]

As discussed in part B.2, section 17-3-1003, MCA, designated the state special revenue fund as the proper fund for money received from leasing state lands, but damages do not technically qualify as money received from a lease. Moreover, section 77-1-117, MCA, provides that unless otherwise provided, all money received as fines, fees, and forfeitures pursuant to state land laws or as penalties for the violation of any of the land laws of this state, except money received by a justice's court, must be paid to the department of revenue for deposit in the general fund. Arguably, a penalty could be interpreted to encompass compensatory damages, since the HRA is part of a state land law that was specifically used to justify these damages by the Court. As it stands, the DNRC is not following this interpretation, so the Legislature may desire to clarify section 77-1-117, MCA, in the future. Nevertheless, since the general fund is the default fund it would be permissible to place the damages in the general fund, which was previously blessed by the Supreme Court in *Darkenwald* as a fund that can hold trust assets.

In *Darkenwald*, the plaintiff challenged the state's alleged improper commingling of state land trust assets, including rental and bonus payments on certain coal leases, into the general fund, asserting that the accounting system violated the state's duty to obtain full market value for school trust lands.[60] The District Court concluded that plaintiff failed to prove financial harm to the school trust beneficiaries, particularly when the Legislature's appropriation to public schools far exceeded the combined money provided by the interest income and the bonus payments.[61] On appeal, the Supreme Court affirmed. The state satisfied its trust obligations by demonstrating that its accounting system was sufficiently accurate and complete to allow plaintiff to ascertain that all trust revenue goes to benefit public schools, while plaintiff failed to carry its burden of proving that the state withheld either the interest income or the bonus payments or improperly diverted those funds to nontrust purposes. Thus, the state statutory scheme did not breach the state's trustee duty by requiring the deposit of interest income and bonus payments into the general fund, and it is a proper place to hold the compensatory damages.

[59] *Montanans for Responsible Use of School Trust v. Darkenwald*, 2005 MT 190 ¶ 9, 328 Mont. 105, 119 P.3d 27 (2005).
[60] *Id.* ¶ 3.
[61] *Id.* ¶ 20.

F. THE LEGISLATURE'S ABILITY TO CANCEL A PURCHASE AND OTHER LEGAL OPTIONS.

As part of your question, you asked if the Legislature can cancel the proposed land purchase if it occurs. In the event the Legislature enacts legislation that seeks to invalidate the land purchase, then the seller of the land could argue that the legislation violates the contract clauses of the U.S. Constitution and the Montana Constitution.

The Contract Clause of the Montana Constitution provides that "[n]o ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature."[62] Similarly, the Contract Clause of the United States Constitution states that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts."[63] Pursuant to the holding in *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 41, 327 Mont. 306, 114 P.3d 1009, the Montana Supreme Court uses a three-part test when analyzing a Contracts Clause challenge:

> (1) Is the state law a substantial impairment to the contractual relationship?
>
> (2) Does the state have a significant and legitimate purpose for the law?
>
> (3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

Additionally, when a state is a party to a contract or if its self-interest is at stake, a court uses a heightened level of scrutiny when evaluating the third prong of the test. The cancellation of a contract and recovery of a purchase price is certainly a substantial impairment of a contractual relationship. While the Legislature can argue that a significant and legitimate purpose of the law is to compensate present beneficiaries of the trust, the only way to reasonably achieve the result is by cancellation of the entire sale. I am unaware of any Montana Supreme Court cases where the Legislature sought to invalidate a consummated land purchase through legislation, but there is certainly a high risk of a Constitutional challenge and I do not advise pursuing this route unless a decision is entered by a court declaring that the Land Board exceeded its authority. Such a topic is certainly an area that can be considered by the Judicial Branch.

In *Norman v. State,* 182 Mont. 439, 597 P.2d 715 (1979), the state (through the Department of Highways) sold a parcel of land to an individual. A year later the state received a letter from an individual who asked if the property was advertised in the newspaper. As it turned out, the state failed to advertise the property as required by law, so it tendered the buyer with a check for the purchase price plus improvements. The buyer sued the state to quiet title instead of accepting the check. The state argued it did not have the power to sell the property, as it failed to properly notice the sale through publication. In response, the buyer argued that it was inequitable to deny the validity of the deed. The Supreme Court ultimately held that since the law required publication before any sale, the state did not have the authority to make the sale. The Court reasoned:

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[62] Art. II, sec. 31, Mont. Const.
[63] Art. I, sec. 10, U.S. Const.

> We recognize it was the negligence of the State's agents that caused the situation which gave rise to this appeal. However, the interest we seek to protect is that of the citizens of this State to receive the highest value from the sale of the lands their State government holds in trust for them. Strict compliance with the constitutional and statutory provisions relating to those lands is the best mode to insure that protection. It is generally conceded that while estoppel may be effected against State government, it may not be asserted where it would interfere with the protection of the public's interest in lands. (citations omitted).[64]

Because the state did not have authority to issue the deed, it was declared void.

As applied here, the purchase of land by the state is factually different than a sale. It is much easier to reclaim a parcel of land that was sold without authority than it is to recover money that was expended without authority to purchase land. However, the *Norman* case shows that a land transaction can be declared void when a state entity does not have authority to engage in a transaction, regardless of the level of negligence involved by an agent of the state. Using this reasoning, a court could rule that the Land Board did not strictly comply with the applicable Constitutional and statutory provisions because the Legislature did not grant the Land Board authority to expend compensatory damages. It is also relevant that the Land Board does not have any authority to purchase land using funds derived from a lease or funds derived from compensatory damages.

The Legislature has a few options at this stage. A proper committee, such as the Legislative Finance Committee, could pursue legal action and request a preliminary injunction and a declaratory judgment against the Land Board in order to block the proposed purchase before it happens and potentially declare that the Land Board acted outside the scope of its authority when it passed the resolution pertaining to the disposition of the compensatory damages.[65] A court could determine that a committee does not have standing to bring a lawsuit, but based on the separation of powers issue that was presented above, a committee should be able to pursue a lawsuit. It is also possible that another party may pursue a lawsuit based on the argument that less state funding will be available in the next biennium, or alternatively that more taxes will need to be collected. Indeed, it is the past and present beneficiaries, and not the future beneficiaries, who would have received the money from the trust had the Land Board leased the riverbeds to PPL A third-party lawsuit would certainly be complex. Unlike prior cases that involved school trust beneficiaries, the potential beneficiaries are numerous. As stated in part B.2, the money from the trust could have been distributed to support most state functions, including the common schools, certain state government buildings, university purposes, a penitentiary, an agricultural college, a school of mines, normal schools, a reform school, and an

[64] *Norman v. State*, 182 Mont. 439, 446, 597 P.2d 715, 719 (1979).

[65] Section 77-1-110(2), MCA, provides that in any civil action seeking an injunction or restraining order concerning a decision of the board or department approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board or the department is wrongfully enjoined or restrained. Consequently, the Legislature could be required to pay damages to the Land Board if it is unsuccessful in obtaining an injunction.

asylum. It is much easier for beneficiaries of school trust lands to show they have standing in court to sue than it is for such a large class of potential beneficiaries. It is hard to predict the likelihood of success of a third-party lawsuit.

Lastly, the Legislature could enact a law that directs the Land Board to sell the acquired land and use the proceeds for a specific purpose. Indeed, the compensatory damages are not restricted by The Enabling Act or Article X, section 2, of the Montana Constitution, and any land acquired from the damages can be disposed of in pursuance of general laws pursuant to Article X, section 11(2), of the Montana Constitution.

Thank you for the opportunity to provide you with this analysis. Please let me know if you have any additional questions or concerns.

Sincerely,

Jaret R. Coles
Legislative Staff Attorney

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