No. 99183-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST, *et al.*,

Appellants,

vs.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, *et al.*,

Respondents.

WAHKIAKUM COUNTY, *et al.*,

Intervenor-Respondents.

BRIEF OF AMICUS CURIAE STATE OF MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

TABLE OF AUTHORITIES

Page(s)

Other Authorities

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

Movant, the Montana Department of Natural Resources and Conservation ("DNRC") is, pursuant to Mont. Code Ann. § 2-15-3301, a department or administrative agency within Montana's executive branch of government. Pursuant in general to Title 77 of the Montana Code Annotated, and in specific to Mont. Code Ann. § 77-1-301, Movant is under the direction of the Montana Board of Land Commissioners ("Land Board") and is responsible for the selection, exchange, classification, appraisal, leasing, management, sale, or other disposition of Montana school trust lands. Movant's interest in filing an *Amicus Curiae* Brief stems from the States of Washington and Montana having entered the Union under or pursuant to the same Omnibus Enabling Act (the Act of February 22, 1889, 25 Stat. 676). Movant has an interest in this appeal because the Montana Supreme Court has relied, at least in part, on this Court's ruling in *Skamania County v. Washington*, 102 Wash.2d 127, 685 P.2d 576 (1984), in further developing the system of land management and trust obligations that Montana had, prior to *Skamania*, abided by for well over one-hundred years. *See Montana Dep't. of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985); *Montanans for the Responsible Use of the School Trust v. Darkenwald*, 328 Mont. 105, 123, ¶

55, 119 P.3d 27, 39, ¶ 55 (2005) ("*Montrust II*") (with respect to Montana's reliance on *Skamania*). *See also, e.g., State ex rel. Galen v. District Court*, 42 Mont. 105, 112 P. 706 (1910) (holding in 1910 that "[i]t has been repeatedly held that the fund created from the sale of lands granted to the state by the federal Congress for a particular purpose is a trust fund 'established by law in pursuance of the act of Congress.'") (citing *State ex rel. Bickford v. Cook*, 17 Mont. 529, 43 P. 928 (1896); *State ex rel. Dildine v. Collins*, 21 Mont. 448, 53 P. 1114 (1898); *State ex rel. Koch v. Barret*, 26 Mont. 62, 66 P. 504 (1901)).

II. ARGUMENT

A. Establishment of Montana's Trust by the Enabling Act and Montana Constitution.

Montana became a member of the Union on February 22, 1889 pursuant to the State's Enabling Act ("Enabling Act" or "Omnibus Enabling Act")), the Act of February 22, 1889, 25 Stat. 676. Under Section 10 of the Enabling Act, Congress granted to the State of Montana sections 16 and 36 in every township within the state for the support of the common schools. [1] Section 10 of the Enabling Act's grant of school or state trust lands to the State of Montana specifically provides that: ". . .

[1] As the Parties have noted, the states of Washington and Montana (as well as North and South Dakota) were admitted to the Union pursuant to the same Omnibus Enabling Act.

upon the admission of each of said states [North and South Dakota, Washington and Montana] into the Union sections numbered sixteen and thirty-six in every township of said proposed states, ... are hereby granted to said states for the support of common schools, ..." Section 11 of the Enabling Act set forth limitations with respect to and conditions on the disposition by the Montana Board of Land Commissioners ("Land Board") of an estate or interest in any lands granted by the Federal government to the State of Montana by providing that: ". . . none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless 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."

Article X, Section 11, of Montana's Constitution provides that these lands "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." The Montana Supreme Court has clearly held the terms of the Enabling Act and Montana Constitution establish a trust:

> **The grant of lands for school purposes by the federal government to this state constitutes a trust** [citations omitted]; and the State Board of Land Commissioners, as the instrumentality

> created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it.

Rider v. Cooney, 94 Mont. 295 at 307, 23 P.2d 261 (1933) (Emphasis added).

Nonetheless the Land Board's and DNRC's management of school trust lands is subject to legislatively created standards and procedures, such as the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. Title 75, Chapter 1, Parts 1-3, and the Streamside Management Zone Act, Mont. Code Ann. §§77-5-301, *et seq*., as well as the Land Board's own standards and procedures (such as the Forest Management Rules, Administrative Rules of Montana 36.11.401, *et seq*.). The Land Board and DNRC's discretion is limited where it must conform to explicit legislative prohibitions or directed procedures. *See Winchell v. Montana Dept. of State Lands*, 865 P.2d 249 at 252, 262 Mont. 328 (1993) (holding that ". . . the broad discretionary powers of DSL[2] are not without limit and are defined by the parameters of statutory requirements enacted by the legislature".) DNRC recognizes, and complies with, its procedural duty to, for example, consider the needs of wildlife, while carrying out its trust duties to generate income for public education, and the other enumerated

[2] "Department of State Lands," the predecessor agency to DNRC.

trust purposes. *See Ravalli County Fish and Game Ass'n, Inc. v. Montana Dept. of State Lands*, 273 Mont. 371, 903 P.2d 1362 (1995) (holding that MEPA imposes procedural, not substantive requirements); *Friends of the Wild Swan v. Dept. of Nat. Res. And Conservation*, 127 P.3d 394, 398-99 (2005).[3]

B. Montana's legislative and executive implementation of the trust mandate.

Pursuant to Mont. Code Ann. § 77-1-202(1), the Land Board:

> shall 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. 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: (a) secure the largest measure of legitimate and reasonable advantage to the state; and (b) provide for the long-term financial support of education.

Art. X, Sections 4 and 11 of the 1972 Montana Constitution, and Mont. Code Ann. § 77-1-202(1), apply to constrain the Board's discretion when making dispositions of estates or interests in state lands that are held in trust for the institutional beneficiaries expressly described in the Enabling Act. Furthermore, Mont. Code Ann. § 77-1-202(1) expressly recognizes –

[3] The undersigned was co-counsel in this Montana Supreme Court appeal.

thereby calling for a sustained-yield balance of – the Land Board's concomitant duties to manage and dispose of Montana's school trust lands or an interest in those lands.[4] DNRC is responsible for managing state trust lands pursuant to Mont. Code Ann. § 77-1-301. In the context of state forested trust lands, Mont. Code Ann. § 77-5-116 allows for the designation, treatment or disposition of such lands as natural areas, open space, old-growth preservation and/or wildlife management, but only after the full-market value has been paid to the affected trust beneficiary for that designation, treatment or disposition.

The DNRC Trust Land Management Division ("TLMD") was established in 1995[5] to manage school trust lands under the direction of the Montana Board of Land Commissioners[6] ("Land Board").[7] TLMD manages approximately 5.2 million surface and 6.2 million subsurface acres of state or school trust lands to generate revenue for the trust

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[4] Mont. Code Ann. § 77-1-101(9) defines "state trust land" as "lands or property interests held in trust by the state: (a) under Article X, sections 2 and 11, of the Montana constitution; (b) through The Enabling Act of Congress (approved February 22, 1889, 25 Stat. 676), as amended; and (c) through the operation of law for specified trust beneficiaries."

[5] Previously the Department of State Lands was tasked with this responsibility.

[6] Pursuant to Article X, Section 4 of the 1972 Montana Constitution, the Land Board is comprised of Montana's governor, superintendent of public instruction, auditor, secretary of state and attorney general.

[7] This management regime is captured in Mont. Code Ann. § 77-1-301(1).

beneficiaries under four programs or bureaus: real estate management, forest management, minerals management, and agriculture and grazing management. The TLMD manages a broad range of land-use activities that include traditional natural resource extraction in addition to other revenue generating activities such as commercial, residential, industrial, renewable energy and conservation leases. School trust land management is a critical element of funding Montana's schools. While TLMD's management portfolio is diverse, its objective remains laser focused: management of school trust lands to maximize revenue pursuant to its trust obligation of undivided loyalty to the school trust beneficiaries.

C. Judicial interpretation and enforcement of the trust mandate.

Similar to Washington courts, the Montana Supreme Court has long held that the Enabling Act created a trust:

> **The grant of lands for school purposes by the federal government to Montana constitutes a trust** [citations omitted]; and the state board of land commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it.

Eg. State ex rel. Graveley v. Stewart, 48 Mont. 347, 137 P. 854, 855 (1913); s*ee also Rider v. Cooney*, 94 Mont. 295, 23 P.2d 261, 263 (1933) (emphasis added).

The U.S. Supreme Court held in *Lassen v. Arizona*, 385 U.S. 458, 469 (1967), and *Ervien v. U.S.*, 251 U.S. 41, 47 (1919), that school trust lands must be utilized strictly for the purposes for which the lands were placed in trust. Trust lands established by a state's Enabling Act cannot be utilized for the enjoyment of the general public, or by other state agencies, without paying the fair market value of that use, in cash, to the trustees for the sole support and benefit of the institutional beneficiaries.

Central to the arguments of the parties before this Court is the breadth of its holding in *Skamania County v. Washington*, 685 P.2d 576 (1984). Appellant maintains throughout its argument that *Skamania*, in the context of the Enabling Act, only recognized a narrow obligation - that was not in the form of a trust, as the trust obligation arose, not under the Omnibus Enabling Act, but under the Washington Constitution - for the disposition of trust assets that does not apply to management of those assets. App. Brief at 21, 29, 30, 31, 32, 33, 35, 36, 38, 40, 41, 43, 44, 45, 47, 49. In doing so, Appellant confines *Skamania* to such a narrow reading – one that was proven to be incorrect in Montana less than a year after this Court issued its ruling in *Skamania* – that had DNRC adopted it, it likely would have been swiftly struck down as a violation of both the Omnibus Enabling Act and the 1972 Montana Constitution. Although not binding on a Washington Court, just shy of a year after this Court decided

Skamania, the Montana Supreme Court seemed to refute Appellant's present assertions in stating:

> **Most recently, the Washington Supreme Court upheld the federal land grant trust** in holding the Washington Forest Products Industry Recovery Act of 1982, R.C.W. 79.01.1331–.1339, unconstitutional. The Act was passed in response to the decline of the prices in the forest products industry at the time. It allowed the Washington Department of State Lands to release contracts previously entered into with loggers and other forest products users because the industry stood to lose a great deal, due to the decline in prices, if the contracts were enforced. The Washington Supreme Court, in *Skamania County v. Washington* (1984), 102 Wash.2d 127, 685 P.2d 576, dealt with the contracts on school trust land. Premising its argument by stating: **"Every court that has considered this issue has concluded that these are real enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees,"** 685 P.2d at 580, the court found the act had violated the trust by transferring trust assets—the contract rights—for less than their full value and held it unconstitutional. 685 P.2d at 583. *See also* Torve and Handy, Skamania County v. Washington: A Case of Divided Loyalties, Fall 1984, Western Natural Resources Litigation Digest Commentary 7.
>
> The above cases establish two main points that are important when considering either minor premise leading to our decision. First, **an interest in school land cannot be alienated unless the trust receives adequate compensation for that interest.** Water that is appurtenant to the school lands is an interest for which the trust must receive compensation. Second, **any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land**. In this case, the DSL contends that to allow lessees to develop private, personal rights on school lands would impermissibly reduce the DSL's ability to manage these lands for their highest value.

State v. Pettibone, 216 Mont. 361, 371, 702 P.2d 948, 954 (1985) (emphasis added); see also *Montrust II*, 119 P.3d at 39.

In *Montanans for the Responsible Use of the School Trust v. State of Montana, ex rel. Board of Land Commissioners*, 989 P.2d 800 (Mont. 1999) ("*Montrust*"), the Montana Supreme Court, relying in part on *Lassen v. Arizona*, declared as unconstitutional a number of Montana statutes that it concluded violated the State's duty of undivided loyalty to the trust beneficiaries, and that prevented the institutional trust beneficiaries from deriving the full benefit of revenue from trust lands. The span of years – just shy of 86 – between *Graveley*, on December 29, 1913, to *Montrust*, on November 2, 1999, is significant, not so much because of the number, but because between those years there were two Montana Constitutions. Montana's first Constitution was ratified on October 1, 1889, which was superseded by the 1972 Montana Constitution, which was ratified on June 6, 1972. The Montana Supreme Court's pronouncements are unified by the precept that the Enabling Act serves as the source of the school trust-land mandate, a mandate that both the 1889 and 1972 Montana Constitutions recognized:

> Under the Act of February 22, 1889 (hereafter, the Enabling Act), ch. 180, 25 Stat. 676 (1889), the federal government granted Montana the sixteenth and thirty-sixth sections of each township in Montana "for the support of common schools." Section 10 of the Enabling Act. ***The federal government's grant of those lands to***

> ***Montana constitutes a trust*** (hereafter, the trust). *See Rider v. Cooney* (1933), 94 Mont. 295, 306–07, 23 P.2d 261, 263 (citations omitted). **The terms of the trust are set forth in Montana's Constitution and the Enabling Act**.

Montrust, 989 P.2d at 803 (emphasis added).

When reviewing a statute or action that affects the disposition of an interest in trust assets or empowers the Land Board to take some action, Montana courts have recognized that DNRC is a trustee of school trust lands. *See Toomey v. State Board of Land Comm'rs*, 81 P.2d 407, 414 (Mont. 1938); *State ex rel. Gravely v. Stewart*, 137 P. 854, 855 (Mont. 1913). In administering the trust, the Board ". . . is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it." *Stewart*, 137 P. at 855. The Land Board must utilize a standard of care in administering the trust that is somewhat higher than the care exercised by an ordinary businessperson. *State ex rel. Thompson v. Babcock*, 409 P.2d 808, 812 (Mont. 1966).

A recent example of a designation, treatment or disposition envisioned in concept by Mont. Code Ann. § 77-5-116[8], and in particular

[8] This statute allows for the temporary or permanent designation, treatment, or disposition of an interest in state forest lands for the preservation or nonuse of these lands as a natural area, as open-space land, for old-growth timber preservation, or as a wildlife management area, but only after the full market value for the disposition or for the foregone revenue has been obtained.

by Mont. Code Ann. § 77-5-208 (2017) came in the form of a Conservation License in Lieu of Timber Sale ("CL").[9] The genesis of the CL was a proposed timber sale in the Bozeman, Montana area, the Limestone West Timber Sale. The sale called for the harvest of 3.315 million board feet of timber. During the scoping of the timber sale pursuant to MEPA, a group of Bozeman-area citizens inquired about the possibility of securing the timber-sale area for conservation purposes. Accordingly, one of the MEPA-required alternatives DNRC analyzed was the citizens' conservation proposal, including the term and value of a CL should the citizens outbid any other potential CL bidders and any timber-sale bidders (i.e., any bidders for the right to harvest the timber within the Limestone West Timber Sale area).

Subsequent to the MEPA scoping of the sale and issuance of the associated environmental impact statement ("EIS") and draft record of decision, the citizens, Save Our Gallatin Front, filed a complaint in the Montana Eighteenth Judicial District Court in Gallatin County, Montana,[10] that challenged DNRC's determination of the value and the term of the CL. Prior to the conclusion of the litigation, bidding on the Limestone

[9] Mont. Code Ann. § 77-5-208 (2017) was repealed by the Montana Legislature during its 2019 legislative session.

[10] Case No. DV-19-75B.

West Timber Sale took place, during which Save Our Gallatin Front bid on the CL, outbidding the lone timber-sale bidder. Save Our Gallatin Front was issued a twenty-five year CL. Importantly, Save Our Gallatin Front compensated the trust beneficiaries by issuing the State of Montana payments totaling $ 411,927.60 to the benefit of the institutional beneficiaries.

The Limestone West Timber Sale CL outcome is analogous, albeit in a converse fashion, to the relevant facts in this Court's 1984 *Skamania* decision. In that case, several timber sales were allowed by an act of the Washington Legislature to release timber sale purchasers from their obligations under their timber sale contracts (i.e., to not pay the fair-market value for a trust asset). The CL obtained fair-market value compensation for the establishment of the CL, which was a legislatively-created management option for the Land Board and DNRC, on a tract of Montana's school trust lands. While the CL statute was repealed in 2019, the iteration of Mont. Code Ann. § 77-5-208 in effect at the time provided "[u]nder the direction of the board, the department may offer and provide a timber conservation license in lieu of the sale and harvesting of the timber to any person . . . ." Several conditions applied before DNRC could provide a CL: DNRC's receipt of a written request during the environmental review process; upon receipt of the request, DNRC was

required to prepare the timber sale for the Land Board's consideration, with alternatives for the timber sale and the CL; DNRC was then required to solicit bids to ensure that fair-market value was secured; and, if successful, the CL bidder was required to furnish a bond sufficient to ensure the performance of the CL and to pay a "forest improvement fee."

Similarly, in *Friends of the Wild Swan v. Dept. of Nat. Res. And Conservation ("FOWS")*, 127 P.3d 394, 398-99 (Mont. 2005)[11], the Montana Supreme Court explained the nature of Montana's land management obligations to the school trust beneficiaries as follows:

> Land trusts require maintenance efforts to ensure long-term sustainability, and **the Board is thus forced to make "difficult to account for" decisions aimed at (1) ensuring long-term sustainability of school trust lands, while also (2) providing adequate resources to present beneficiaries** (emphasis added). See Babcock, 147 Mont. at 53-54, 409 P.2d at 811; see also § 77-1-203, MCA. This duality of purpose is unique in the context of land and resource management because it requires a trustee to consider more than just immediate financial benefit in its decision making. Indeed, one purpose of the Goat Squeezer sale was to promote timber-stand health.
>
> Further in this regard, § 77-1-203, MCA, "Multiple Use Management," requires land management with the goal of promoting multiple purposes on the land, "so that ... harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land...." Section 77-1-203(1)(b), MCA. **This statute evidences legislative recognition that in the context of trust land management, sustainable use and long-term forest health are important non-economic factors which the Board must also**

[11] The undersigned was co-counsel in this Montana Supreme Court appeal.

> **consider** (emphasis added). Although the statutory directive to "secure the largest measure of legitimate and reasonable advantage" certainly includes economics, the phrase is not limited in purpose to financial return, thus undercutting FOWS's argument that there must be additional accounting efforts in order to comply with it.

As the *FOWS* Court clarified, there is no mention of white-tailed deer or any big-game species as a direct object of the State's Enabling Act. These lands are not set aside, in trust, for that purpose. Instead, school trust lands are set aside for the fiscal support of specific trust purposes. In *Mont. Trust*, the Montana Supreme Court cited private trust law in striking down a number of statutes which violated the State's duty of undivided loyalty to the specified beneficiaries and which prevented the institutional trust beneficiaries from deriving the full benefit of revenue from trust lands. 989 P.2d at 808.

D. <u>A Trust Exists in Montana.</u>

The trust themes reflected throughout the Omnibus Enabling Act and in Montana's constitution, legislation and case law discussed above share innumerable commonalities with Washington's Constitution, legislation and case law. Montana case law establishes that federal lands granted to Montana through the Enabling Act created a trust to benefit schools. *State ex rel. Graveley v. Stewart*, 137 P. 854, 855 (Mont. 1913); s*ee also Rider v. Cooney*, 23 P.2d 261, 263 (Mont. 1933); *Jeppeson v.*

Mont. Dep't. of State Lands, 667 P.2d 428 (Mont. 1983); *Montana Dep't. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985); *Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. U.S.*, 251 U.S. 41 (1919). Pursuant to this trust, the trustee is under a duty to act solely in the interest of the beneficiaries as to matters involving trust assets. This duty is a duty of undivided loyalty and is the bedrock of the trust relationship. *Montrust*, 989 P2d at 808 ("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.") (citations omitted); *Skamania*, 685 P.2d at 579-582.

Appellant maintains that by including the term "all the people", Washington's constitution created two trusts. The first is a trust that benefits schools through the disposition of an interest in trust lands for revenue. The second consists of a trust for the general public that manages trust lands for an undefined public benefit. Appellant Brief, pp. 37 – 49. This interpretation is not supported by the Enabling Act from which the trust originated and creates the very intractable conflict of interest and divided loyalty that over 100 years of trust law prohibits. Appellants' position is inconsistent with Washington and Montana precedent. As the Montana Supreme Court concluded in *FOWS*, school

trust lands must be managed to provide revenue to the designated institutional beneficiaries; management for the general public would be inconsistent with this unambiguous trust objective.

III. CONCLUSION

Montana law establishes that a real, enforceable trust exists in Montana created by the grant of trust lands to Montana by Congress in the Enabling Act. This trust inextricably links the management of the trust "corpus" and/or its constituent assets with a disposition of the corpus or an interest in the corpus. The management and disposition for fair market value are so closely entwined as to not legally be severable. A trustee of land cannot divorce the notions of managing its land base on the one hand from the eventual disposition of the land itself or a resource on that land - such as timber – on the other without violating its fiduciary obligations to its beneficiaries.

I certify that this brief contains 4,140 words, in compliance with the Rules of Appellate Procedure.

Dated: September 3, 2021

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 3, 2021, through the Washington State Appellate Courts' eFiling Portal.

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

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