VOLUME NO. 36 **Opinion No. 92**

STATE LANDS — School Lands — General use by state, compensation for; Article X, Sections 3 and 11, Montana Constitution 1972; Sections 81-2701 et seq., Revised Codes of Montana 1947.

HELD: So that the state will not commit a breach of trust under the Enabling Act and Montana Constitution, the state must actually compensate its school trust in money for the full appraised value of any school trust lands designated as or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974. Such compensation can only be avoided by securing the consent of Congress.

July 7, 1976

Mr. Leo Berry, Jr., Acting Commissioner
Department of State Lands
1625 11th Avenue
Helena, MT 59601

Dear Mr. Berry:

Your office has requested my opinion on whether there must be compensation for school trust lands which are designated natural areas under the Montana Natural Areas Act of 1974.

The Natural Areas Act is codified in Title 81, chapter 27, R.C.M. 1947. Essentially it provides for the setting aside and preservation of certain lands — including school trust lands — qualifying as "natural areas", through "designation" by the state board of land commissioners or the legislature. Natural areas can also come into being by purchase, trade, or gift. Sections 81-2702 through 81-2704.

To answer your question, it is first necessary to examine the nature of school trust lands and the state's responsibility over them. The Enabling Act of February 22, 1889, 25 Stat. 676, which admitted Montana into the Union along with North Dakota, South Dakota, and Washington, granted sections 16 and 36 in every township "for the support of common schools"(§10) and prohibited disposition of such lands "unless the full market value of the estate or interest disposed of...has been paid" (§11). The Montana Supreme Court has long held

that school lands as well as their proceeds and income constitute a trust. **State ex rel. Galen v. District Court,** 42 Mont. 105, 114, 115-116, 112 P. 706 (1910); **Rider v. Cooney,** 94 Mont. 295, 306-307, 23 P.2d 261 (1933); **Texas Pacific Coal & Oil Co. v. State,** 125 Mont. 258, 263-264, 234 P.2d 452 (1951). Thus, the Enabling Act must be strictly construed and its grants of property devoted exclusively for the stated purposes. **Texas Pacific,** 125 Mont. at 263; **In re Beck's Estate,** 44 Mont. 561, 576, 121 P. 784 (1912).

Article X, Sections 3 and 11, of the 1972 Montana Constitution embody the above rules:

> Section 3. Public school fund inviolate. The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.
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> Section 11. 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.** (Emphasis added)

These provisions are limitations upon the power of disposal by the legislature. **Newton v. Weiler,** 87 Mont. 164, 170-171, 286 P. 133 (1930).

While the Enabling Act does not say in so many words that the state is under a duty to sell or lease school trust lands, it is elementary that this trust be administered so as to secure the largest measure of legitimate advantage to the beneficiary. **Rider,** 94 Mont. at 307. As a practical matter this means the state must do something to generate and sustain income from school trust lands whenever possible. **State ex rel. Ebke v. Board of Educational Lands and Funds,** 47 N.W.2d 520, 523 (Neb. 1951); **Lassen v. Arizona, infra,** 385 U.S. at 463. The state's discretion is not whether but how to seek gain from school lands for best advantage to the trust. See **Thompson v. Babcock,** 147 Mont. 46, 409 P.2d 808 (1966).

Being acts of Congress, enabling acts are paramount authority in situations like the one at hand. Interpretations thereof by the federal courts naturally have far-reaching impact. The case of **Lassen v. Arizona,** 385 U.S. 458, 17 L.Ed. 2d 515, 87 S.Ct. 584 (1967), is illustrative. **Lassen** considered whether the state of Arizona, pursuant to the New Mexico — Arizona Enabling Act, was obligated to compensate the school trust for school trust lands taken for highway purposes. The court preliminarily observed that:

> The issues here stem chiefly from ambiguities in the grant itself...The Act describes with particularity the disposition Arizona may make of the lands and of the funds derived from them, **but it does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant...** (Emphasis added) 385 U.S. at 461.

After reviewing the terms and legislative history of the Act, the court determined that the grant was plainly expected to produce a school fund, accumulated by the sale and **use** of the trust lands, and that its restrictions were intended to guarantee the trust appropriate compensation for trust lands. 385 U.S. at 463, 464. The issue was predictably resolved:

> We hold therefore that **Arizona must actually compensate the trust in money for the full appraised value** of any material sites or rights of way which it obtains on or over trust lands. This standard...most consistently reflects the essential purposes of the grant. (Emphasis added) 385 U.S. at 469-470.

It should be stressed that technically there was no "disposition" of school trust lands in **Lassen.** (See §10 of Montana's Enabling Act.) Arizona retained full control over the disputed lands, merely changing the "use" from support of education to construction of highways. The lack of such disposition, however, made no impression upon the court. What concerned them was a use or dedication of school trust lands that failed to monetarily enhance the trust.

A brief discussion of the indemnity principle is now in order. Montana's Enabling Act, §10, provides that where sections 16 or 36 had previously been disposed of by Congress, other equivalent lands were granted as indemnity lands. In **United States v. 111.2 Acres of Land in Ferry County, Washington,** 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd 435 F.2d 561 (9th Cir. 1970), the court explained that...

> the principle of indemnity requires that no land or proceeds be diverted from the school trust unless the trust receives full compensation. This principle is explicitly a part of the Washington (Montana) Enabling Act. 293 F. Supp. at 245.

It was then held that since Congress had established a means of indemnification for loss of school trust land, the state of Washington alone could not statutorily donate rights of way across such land even to the United States. To do so "would constitute a breach of trust which the Court will not countenance." 293 F. Supp. at 1049.

Given the foregoing authorities, the requirement of compensation for school trust lands used for any purposes other than "the support of common schools" is unavoidable absent the express consent of Congress. That uses such as highways, parks, or natural areas might generally benefit the public is immaterial because they simply go beyond the narrow condition of the grant in the Enabling Act.

How much compensation may be necessary in a given instance raises another question. The Enabling Act, §11, calls for "full market value" where estates or interests in school lands are transferred, and for "public sale" (presumably to realize full market value) where the lands themselves are sold. Establishment of natural areas would not fall into either of these two categories, but rather would parallel Arizona's taking of school trust lands for highway purposes. The court in **Lassen** labeled such taking a "use" or an "acquisition"

which the state could obtain by any procedures "reasonably calculated to assure the integrity of the trust and to prevent misapplication of its lands and funds." 385 U.S. at 461, 462, 465. For example, Arizona was allowed to just pay cash in the amount of the appraised value of the school trust lands it desired. I might add that on account of the unique situation presented when a state seeks school ttrust lands for its own general use, the comments regarding full market value in **Thompson v. Babcock,** 147 Mont. at 53, are of little help here.

You have outlined certain constitutional problems that might be encountered in administering the Natural Areas Act in the event it is determined compensation must be paid for school trust lands. For the time being I suggest your department and the state board of land commissioners simply proceed on the assumption such compensation is part and parcel of the Act. If difficulties persist, a declaratory judgment should be sought.

THEREFORE, IT IS MY OPINION:

So that the state will not commit a breach of trust under the Enabling Act and Montana Constitution, the state must actually compensate its school trust in money for the full appraised value of any school trust lands designated as or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974. Such compensation can only be avoided by securing the consent of Congress.

Very truly yours,

ROBERT L. WOODAHL
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