

VOLUME NO. 40

OPINION NO. 24

BOARD OF LAND COMMISSIONERS - Board required to seek fair market value in state grazing lease fees;
STATE LANDS - Board of Land Commissioners required to seek fair market value in state grazing lease fees;
MONTANA CODE ANNOTATED - Sections 77-6-205, 77-6-507(1)(b), 77-6-507(3)(a);
MONTANA CONSTITUTION - Article X, section 11.

HELD: The Board of Land Commissioners in establishing state grazing lease fees has not only the authority to negotiate leases in excess of the formula established by statute, but, in light of its constitutional sources, an absolute duty to achieve fair market value on each grazing lease it negotiates.

11 October 1983

Dennis Hemmer, Commissioner
Department of State Lands
1625 Eleventh Avenue
Helena MT 59620

Dear Mr. Hemmer:

You have requested my opinion on the following issue raised by the Legislative Audit Committee pursuant to a

recent audit report, "State-Owned and Leased Land," June, 1983 (hereinafter referred to as "audit report");

Under section 77-6-507, MCA, may the Board of Land Commissioners charge a rental rate on state grazing lands higher than the minimum specified by statute?

Section 77-6-507, MCA, contains a formula enacted by the Montana Legislature in 1949 (with subsequent amendments) to determine a "minimum annual rental per section" in state lands leased for grazing purposes. It is the position of the Legislative Auditor that the use of the term "minimum" implies authority for the Board to seek greater fees where possible. I concur.

It is helpful to review how the leasing process actually works. Since most state lands suitable for grazing are already under lease, the key statutory provision concerns renewal of leases. Section 77-6-205, MCA, provides that the current lessee has a "preference right" to meet the highest bid made by any other applicant. This provision provides little incentive for outside bidding. The results seem to bear this out: Of the 5,711 grazing leases examined in the audit report, only 284 were established by competitive bids, approximately five percent. (Audit report, p. 25, ill. 5.)

If there are no other bids, the current lessee is entitled to renew "at the rental rate provided by law." § 77-6-205, MCA. The Department of State Lands has interpreted that phrase to refer to the statutory formula contained in section 77-6-507, MCA. It has further maintained, and that is the basis of the controversy here, that it has no authority to go beyond the fee established by the statutory formula.

The formula varies according to the capacity of the land involved but its basic determinant is "six times the average price per pound of beef cattle on the farm in Montana for the previous year." § 77-6-507(3)(a), MCA. Consequently, under the formula a grazing fee is established which is unrelated to market value. The resulting disparity is indicated in the audit report: Private grazing leases range from \$8 to \$12 an A.U.M. (animal-unit-month as defined in § 77-6-507(1)(b), MCA);

state grazing leases charged a minimum rental rate of \$2.97 per A.U.M. for 1983.

If this were merely a matter of statutory interpretation it would be arguable to uphold the Board's position that it does not have authority to negotiate beyond the formula price established in section 77-6-507, MCA. However, as I discuss below, this subject matter touches on the basic sources of our statehood.

The requirement that the State obtain fair market value for the disposition of any interest in state lands arises from two fundamental sources.

One is the Enabling Act of 1889, the terms of which Montana accepted in exchange for the establishment of its statehood within the United States. Section 10 of the Act (25 Stat. 676) granted sections 16 and 36 of every township to the State "for the support of the common schools." Section 11 further provides:

[N]one of such lands, nor an 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. [Emphasis added.]

The second fundamental source is the Montana Constitution which, in furtherance of this compact with the federal government, provides in article X, section 11:

No such land [referring to lands granted by Congress] 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. [Emphasis added.]

The mandate to obtain fair market value, because of its fundamental sources, cannot be negated or diminished by statute. The Legislature may, however, establish a formula for calculating the lease price of state lands where its application results in obtaining fair market value. Indeed that was the decision in a case involving the statutorily-established 12½% royalty interest for oil and gas leases of state land. State ex rel. Strandberg v. State Board of Land Commissioners, 131 Mont. 58, 307 P.2d 234 (1957).

A recent case in South Dakota, involving a statutory framework apparently quite similar to ours, is Fox v. Kniep, Members of the Board of School and Public Lands and Kane, Commissioner, 260 N.W.2d 371 (S.D. 1977). Kane was the Commissioner of Schools and Public Lands. He compiled information which satisfied him that the return from state grazing leases was substantially below fair market value. South Dakota had a statutory formula for establishing the state grazing fee unrelated to market value. Without having statutory authority to do so, Kane increased all state grazing leases by 50% citing the fair market value requirements in the South Dakota Constitution and Enabling Act.

A lessee brought suit charging that Kane acted beyond his authority. The South Dakota Supreme Court held that the State Constitution and Enabling Act required Kane to seek fair market value on state grazing leases. The court did not find the statutory formula violative of the fair market value standard per se, as long as it was just a starting point for bids.

An even more recent case in point is the one of Oklahoma Education Association v. Nigh, Commissioners of the Land Office, 642 P.2d 230 (Okla. 1982). Although the statutory formula for establishing grazing fee rentals was different from Montana's, the court found that its application resulted in substantially less than full market value and thus violated the "sacred trust" undertaken by the state in the Enabling Act and the Oklahoma Constitution.

In light of this consideration of relevant cases and fundamental sources of law, it is apparent that any statutory formula used in establishing grazing fees must result in the State's obtaining fair market value for its leasehold interest. Nothing less will satisfy the

requirements of the Montana Constitution and Enabling Act. Under the Department's narrow interpretation of its authority to negotiate leases, it is possible that the entire statutory framework for establishing grazing lease fees would be found constitutionally infirm.

THEREFORE, IT IS MY OPINION:

The Board of Land Commissioners in establishing state grazing lease fees has not only the authority to negotiate leases in excess of the formula established by statute, but, in light of its constitutional sources, an absolute duty to achieve fair market value on each grazing lease it negotiates.

Very truly yours,

MIKE GREELY
Attorney General