

MINUTES

MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION

JOINT SELECT LEGISLATIVE COMMITTEE TO DISCUSS BOARD OF REGENTS/LAND BOARD ISSUES

Call to Order: By **SENATOR BRUCE CRIPPEN**, Chair, on February 6, 1997 at 10:00 a.m. in the Governor's Conference Room; Helena, Montana.

Members Present:

Senator Bruce Crippen, Chair
Senator Fred VanValkenburg
Representative Sonny Hanson
Representative Vicki Cocchiarella

CHAIR CRIPPEN called to order the committee meeting to discuss university land transactions, remarking that the legislative leadership in appointing the bipartisan committee hoped that differences between the Land Board and Board of Regents regarding land transfers could be resolved. He asked **Greg Petesch** to comment on the issue.

Greg Petesch, Director of Legal Services for Legislative Services Division, said that the issue before the select committee was an attempt to determine if there was an alternative to the litigation currently being pursued to resolve the issue. He indicated that the underlying issue was a series of land transactions dating back approximately 16 years between various university system units and foundations created for the support of those units and between private individuals. Questions raised on these issues in front of the Land Board are whether they are arms length transactions and whether fair market value was received for the sale. The fundamental issue the Court is being asked to address is whether the Board of Regents had authority to make those land transactions, which is the gist of the petition the Board has filed with the Supreme Court. He added that the Land Board at a meeting this date voted to file their response raising other issues. They asked that the original jurisdiction not be granted, that issues be framed differently to cover a broader variety of legal issues and to also include other parties that might be involved in the transactions. He commented that in an attempt to implement a portion of the Constitution last session, a bill was introduced by Rep. Peck to provide a general law for the disposition of certain property held by either the Regents or units. This was done by the legislature in other instances on abandoned former institutions and general laws for conveyancing property to other governmental entities. He said it is not unprecedented that the legislature adopt general laws under the authority of the Constitution for this; also the dispositions that the Land Board makes has a set of general laws they follow. He noted that Rep. Peck has a bill in this legislative session that would clarify last session's legislation

and put other criteria in place for the Regents to follow when making future land dispositions over which the general law would apply.

CHAIR CRIPPEN asked for comments by members of the Committee.

SENATOR VAN VALKENBURG commented that he did not particularly share the opinions of **House Speaker Mercer** and **SENATE PRESIDENT AKLESTAD** that the matter should be easily resolvable without a court deciding the issue. He maintained there are significant legal and constitutional issues involved that may not be resolvable in any settlement type fashion, however he hoped that the Land Board and Board of Regents would attempt to solve the issue. He remarked that constitutional issues should try to be avoided, as well as trying to preserve resources and settle matters without spending a significant amount of money in litigation and put the outcome at considerable risk. He reported that while the legislature is not in a very good position to start mediating or making suggestions, if the parties have some ideas it would be possible that the legislative committee dealing with this issue could have further discussion between the parties. He concluded that the legislature was busy with other issues and did not have the background that the Land Board and Board of Regents had dealing with the issue.

REPRESENTATIVE COCCHIARELLA indicated that a settlement without a court judgment would be in the best interest of the state. She mentioned the possibility of the Land Board and Board of Regents hiring a mediator rather than spending money and time in the courts.

REPRESENTATIVE SONNY HANSON commented that he would like to have the Attorney General indicate what transpired at the Land Board meeting held this date regarding the expansion of the issue.

CHAIR CRIPPEN noted that the legislature had a vital concern in the matter and he questioned if something could be done by the committee without going to the Supreme Court.

ATTORNEY GENERAL JOE MAZUREK said the Land Board response indicated there is important factual background in which they do not believe it is an appropriate case to start in the Supreme Court. He was directed to do a comprehensive review of past transactions, adding there is a factual record that should be considered that typically would be developed in a district court proceeding. A response has been framed essentially stating that they do not believe it is appropriate for original jurisdiction but to the extent they think it is, the court should frame the issues in a broader fashion so the issues can be resolved; and it has been suggested how the court might do that. He noted that his charge as Attorney General is defending the constitutionality of the statute passed by the last legislative session, requiring the Regents to abide by the general law referenced by Mr. Petesch.

In questioning by **REPRESENTATIVE HANSON** as to who makes the decision if it goes to the lower court, **MR. MAZUREK** said the Regents filed an original proceeding before the Montana Supreme Court, which has now been responded to.

In questioning from **CHAIR CRIPPEN** as to whether the bill in the last legislative session was retroactive and dealt with transactions taken prior to the effective date of the bill, **MR. MAZUREK** said two separate issues were raised which are closely intertwined and go to the authority of the legislature or the Regents complying with general law, not only with HB 351 passed last session but also laws that existed prior to the last legislative session.

CHAIR CRIPPEN asked **MR. KAZE** if he would like to respond.

JIM KAZE, BOARD OF REGENTS, said the issue they tried to address in filing a constitutionally based original jurisdiction action with the Supreme Court was strictly the constitutional issue of authority to deal with lands and property ostensibly owned by the university system on behalf of the state of Montana. They judged it to be a way to reduce costs and narrow the issues in a shorter time frame so as not to prolong or create litigation in long drawn out proceedings. They hoped if they could determine who had constitutional authority that the issues would be narrowed. He reported that the Regents supported the bill in the last legislative session in a sense of cooperation and collaboration and in an effort to move forward. The original action before the Supreme Court is not about overturning the law passed by the last legislative session.

When asked to comment, **GOVERNOR MARC RACICOT** explained that after the Fort Missoula issue was settled because of the specter of official investigation by the Land Board and the Attorney General's office, attention was turned to legislation. In an attempt to avoid future problems without conceding any constitutional authority from one body to the other, there was an attempt to work out a process for the future to avoid a constitutional crisis. Both bodies supported the legislation that was passed by the legislature and put into effect. Thereafter there was a concern about transactions that occurred up to 16 years ago, which matter was taken up by the Land Board when it was decided to have the transactions before the court to have a judgment made as to compliance of the law. When the decision was made by the Land Board, the Board of Regents then filed a suit to narrow the issues and resolve the matter. He explained his position that the Land Board does not have the authority or standing to make the inquiry, however the Attorney General could make the decision acting in the public's interest. He expressed his belief that there was not a possibility of resolution of the issues without being submitted to the Montana Supreme Court.

When questioned by **SENATOR CRIPPEN** if the suit by the Board of Regents is inappropriate at this time, **GOVERNOR RACICOT** claimed that it was inappropriate to go to court in the first place, and it was a mistake for the Land Board to assume it had jurisdiction to make inquiries. He thought the Regents made the right decision in attempting to narrow the issues to seek an early disposition. In questioning from **SENATOR CRIPPEN** as to position of the parties if the Court ruled that the Land Board had authority and the Board of Regents did not have authority, **GOVERNOR RACICOT** said the Land Board made a decision to make inquiry into those transactions on an individual basis, therefore they will go forward with the process of determining authority and legitimacy of the transactions and whether they were appropriate under the terms articulated by the Supreme Court defining the authority of the Land Board.

ATTORNEY GENERAL MAZUREK agreed there was room for debate on many of the issues, but the majority of the Land Board believes that these are public lands. There is a serious and legitimate concern about the manner in which some of the transactions occurred. It was not the decision of the Land Board to attempt to invalidate every decision but to focus on three exchanges, although they will involve subsequent transactions as well. They believe if public lands are disposed of that it should be in accordance with the constitutional requirements. He proclaimed that his personal concern is that the majority of the Land Board wanted a commitment that the statute passed last legislative session would be followed prospectively and there would be an open process and review by the Land Board not to try to manage the Regents' decisions or land transfers but provide a check that the process was fair and open. There is also concern about three transfers by the MSU foundation regarding fair market value being obtained in those exchanges, and they felt something should be accomplished to equalize the values of those transactions for the beneficiaries' benefit. There is also the question of accountability of the foundations and the openness of their process. He concluded most of the transactions were done in good faith where fair market value was obtained.

SENATOR CRIPPEN questioned if the Court ruled that the Land Board had the authority to do that and the Board of Regents were in error that the transactions taking place were done improperly, the Land Board would have no choice but to go back and void the transactions in question which would also raise the issue of why didn't the Land Board exercise its authority on other transactions of a similar nature during that time.

ATTORNEY GENERAL MAZUREK stated there was a possibility that could happen. He added there would not be a definitive resolution of these issues unless there was a court decision. There had been informal discussion in an attempt to resolve this before the decision was made by the Land Board to initiate litigation.

GOVERNOR RACICOT noted that the Regents did make inquiry of the Board of Land Commissioners on reviewing transactions, and the Land Commissioners disclaimed any interest or any authority to be able to review the activities of the Board of Regents. He added that public lands are very important public assets, but there was legal constitutional authority supervising those issues; there were no parties to those transactions or beneficiaries coming forward with an action of their own concerning the transactions of 16 years ago. He concluded that the Land Board is the body least authorized and the most dubious to bring forward this review process.

ATTORNEY GENERAL MAZUREK maintained that his office indicated they would be a party with the Land Board in the litigation based on the investigation and review done by his office.

SENATOR CRIPPEN commented if the Court ruled that the Land Board had the authority, the fact that it was not exercised in some of the transactions and that they didn't feel they had the authority could be construed to be that they were acting outside the scope of their authority and would subject the transactions to further scrutiny.

In questioning from **CHAIR CRIPPEN** relative to the statute, **MR. KAZE** said they have followed the process of the 1995 law from a prospective standpoint and have adopted a policy setting forth procedures and processes very similar to the statute in an attempt to address the issue. He added they want this to be a constitutional accommodation but they do not deny they have constitutional authority to deal with the issue. He said the Board of Regents had not acted in bad faith or in a way suggesting that the university system was gaining illegally or inappropriately. He said while they are subject to making bad judgment calls, they are also protectors of the constitution and the university system. The action brought before the Supreme Court is intended to bring the issue to a quicker and less expensive resolution than would be a trial based on facts. In further questioning by **SENATOR CRIPPEN** as to the necessity of the lawsuit if there was a bill, **MR. KAZE** said otherwise they would be faced with litigation in Montana district court protracted by the discovery process, witness process and an unresolved issue into the future. When questioned by **SENATOR CRIPPEN** if it is their opinion that they have constitutional authority to do what they are doing notwithstanding the language that was in the bill, **MR. KAZE** said they so stated that in testifying for the bill. When asked by **SENATOR CRIPPEN** if it was as if the bill was not there, **MR. KAZE** remarked that they have chosen to accommodate that process and adhere to that process, bring the transactions to the Land Board, and they have adopted a policy in detail in an attempt to address the issues of concern to the Land Board and others.

PAT DAVIDSON, Board of Regents, related that whether or not there would be a lawsuit brought on behalf of the Board of Regents to

the Supreme Court in the present form would not have happened if the other issue and Land Board action had not precipitated that. What forced it going to the Supreme Court was the issue of what authority the Land Board had in the transactions.

CHAIR CRIPPEN said that was clearly set forth in HB 351 that was passed in the last legislative session.

MIKE GREEN, student member of Board of Regents, indicated that the only provision in the statute being challenged was the portion stating that the Land Board can overrule a transaction based on the needs of the system.

SENATOR VAN VALKENBURG maintained that the Regents should fully expect when they go to the Supreme Court in an original proceeding that the Land Board is not necessarily going to agree to decide the matter on the one issue; they would want to go back to the district court and argue every issue they could to persuade the court that there is more than what the Regents want to say which would be a protracted, risky proposition. While the Attorney General feels there is a possibility of resolution of the case before resolution by the courts, the Regents have not indicated any possibility of a resolution. He expressed concern that the Regents are running a significant risk by not attempting to resolve the issue. If the Regents lose, there would be a significant cloud on the title of the property that was purchased by good faith purchasers from the university system. The purchasers would have an opportunity to come back against the university system to obtain potential damages as a result. The Regents might then put resources of the university system at considerable risk.

MR. KAZE reported that the constitutional authority of the Board of Regents had been tested twice before the Montana Supreme in the 24 years of the Board of Regents. He proclaimed the Regents had never taken the issue lightly and it would be a risk for the citizens of Montana ultimately. He concluded they had never found an issue more pressing on which to base an action with the Supreme Court.

GOVERNOR RACICOT maintained the resolution sought would be a determination whether there was market value paid in some of the transactions. Unless the Board is willing to in some way acknowledge that did not occur with transactions occurring 16 years ago or the Board of Land Commissioners is willing to agree that they don't either have to make that determination or that market value was secured, there is no resolution without a court determining who has authority to make this judgement. The issue is settled if the Regents have the authority to make the judgement; if the Land Board has the authority to make it, an inquiry would have to be made into the various issues that are of concern. He concluded he had not seen a willingness to make movement toward resolution.

ATTORNEY GENERAL MAZUREK said there was resolution in the Fort Missoula case. **GOVERNOR RACICOT** maintained it was resolved because the specter of litigation made the parties feel it wasn't worth going forward. He contended this present issue would go on for a very long period of time.

CHAIR CRIPPEN questioned if there was a way the issue could be decided among the parties without having to go to court.

MIKE GREEN commented that concern about the cloud over the titles would remain until the issue of constitutional authority of the board was decided, and any transactions would be subject to scrutiny in a Montana district court until the issue was settled by the Supreme Court.

ATTORNEY GENERAL MAZUREK stated that resolution of the question of who had authority doesn't answer the question of prior transactions. The question would remain whether full market value was obtained; the potential would still exist to scrutinize the transactions.

CHAIR CRIPPEN claimed if the Regents declared to have the authority, there would still be the question whether the transactions were done in a proper manner.

ATTORNEY GENERAL MAZUREK contended the potential for resolution should not be foreclosed. He added there had been a potential for ratification of past transactions by the legislature. Representative Peck indicated he would be willing to carry legislation if he could be satisfied there was fair consideration that they were proper. There is a question in some people's minds that could be done constitutionally. He concluded if we want the ultimate resolution of this decision as to who has final authority, the only place to get that would be in the court.

SENATOR VAN VALKENBURG declared that the Legislature could put the constitutional amendment on the ballot to be decided by the people.

JIM KAZE said the Regent's decision to file the action was done in good faith and questioned if the issue could be resolved without court direction on authority.

CHAIR CRIPPEN questioned if there was a way they could take the transactions in question, look at them and determine if in the Land Board's opinion there was fair market value given.

ATTORNEY GENERAL MAZUREK commented that both parties have asked the court to hear oral argument on the issue of whether or not to accept and exercise its original jurisdiction. They have suggested to the court that there are issues surrounding the letter written by the Land Commissioner and that a more appropriate place to resolve them is in the district court.

JIM KAZE remarked there is always a possibility that the two sides to a process could stipulate to continue the matter while making further attempts to address the issues raised.

ATTORNEY GENERAL MAZUREK interjected that he and Governor Racicot do not speak for a majority of the Land Board because a majority was not present.

SENATOR VAN VALKENBURG claimed that it was unfortunate that the entire Land Board was not present to discuss the issues, rather that the information presented today would have to be relayed to them.

GOVERNOR RACICOT remarked that the Land Board members wanted to be present but had other commitments.

CHAIR CRIPPEN asked Mr. Petesch to give his thoughts on how this issue might be resolved.

GREG PETESCH said as long as there is a dispute between the Land Board and the Regents as to whether fair market value was received in those exchanges, the defect which the constitution requires that the state receive fair market value cannot be cured through legislative ratification. Rep. Peck's bill that was an attempt to constitutionally accommodate the issue of who had authority could possibly be, with his new bill, retroactively applied to the transactions and as part of that ratify the past transactions so that the innocent purchasers have more security than they currently have. That could only be done if there was agreement between the Land Board and the Board of Regents as to whether fair market value was achieved. When questioned by **CHAIR CRIPPEN** as to a determination if fair market value was achieved, **MR. PETESCH** said that it was potentially possible for the Land Board and the Regents to agree as to what fair market value was.

GOVERNOR RACICOT explained that he never wanted to go to court, and **ATTORNEY GENERAL MAZUREK** said that was not inconsistent with what was in his original report. He added that there are other parties that have been involved in these discussions that may want an opportunity to comment. **JIM KAZE** concluded that any discussion is a valuable discussion and it certainly should be reviewed, however there are other Regents not present at this meeting and other parties to the transactions that may not be represented today.

CHAIR CRIPPEN voiced concern whether the parties would be willing to go back to their respective boards, discuss the issue and report back, adding that the central issue still remains the issue of constitutional authority. He concluded he was attempting to find an accommodation to see if something could be done to avoid costs, realizing there is always the potential of a lawsuit.

CHAIR CRIPPEN opened the meeting up to public discussion.

FRANK CULVER, BOZEMAN, presented a written statement to the committee, noting that many people in Bozeman are very concerned about the land exchanges. (See Exhibit 1)

RON WATERMAN, representing MSU foundation, indicated he previously had discussions with Land Board members encouraging a resolution of this matter, adding that any resolution would take a large effort on the part of the parties. He concluded that he would strongly urge the development of a resolution, and short of that he would urge going to the Supreme Court because that would at least resolve a singular question and potentially put the parties in a position where many of these transactions where there is no question other than authority could be flushed out of the system and the good faith purchasers could be relieved of the cloud that might otherwise exist. He concluded that he was committed to continue a process that would look at a resolution.

ROSS BEST, Missoula, stated his belief that it is unavoidable that the Montana Supreme Court will decide the jurisdiction question. He voiced concern about the manner in which the discussions were being held. He objected to a committee having a connection to the university system or corporate entities being involved in this litigation and attempting to mediate with the Land Board and the Board of Regents. He voiced concern about the illegal meeting that the legislative committee previously held that was not properly noticed, noting the inappropriateness of the group proceeding with disregard for the rights of the interested public. He remarked that the committee could have scheduled their meeting when the all Land Board members could have been present and with proper notice given. He concluded that the question of ratification would not be permissible because it would amount to a new sale and when a new sale occurs, all requirements of public notice, open bidding and getting full market value will still apply. He concluded that he disagreed with the legal positions taken by the Board of Regents with some exceptions but he would not question their sincerity in pursuing the matter. He added that the Regents and Land Board have a positive duty to proceed to court to have the question resolved.

GERARD BERENS, Treasurer of Save the Fort, indicated that with regard to ratification, there would need to be a resolution if the land was sold properly at fair market value. It would be hard to correct problems with regard to the fair market value and also satisfying the public's concern regarding a possible solution. He maintained that the court would have to set forth the facts and attempt to resolve the dispute. In conclusion, he applauded the Regents for adopting policies and procedures, noting that there should be an attempt to make them stronger in all areas.

In questioning from **REPRESENTATIVE HANSON** as to background of **ROSS BEST**, **ROSS BEST** indicated he is a private citizen that put a lot of time into studying the law in a few specific areas, adding he is not yet an attorney.

CHAIR CRIPPEN questioned if the parties would be willing to go back and discuss this matter fully with their respective bodies in public meetings to determine if there could be some discussion leading to solving the land transfers in question.

ATTORNEY GENERAL MAZUREK indicated that he would confer with other Land Board members at their February 18th meeting to see if there was interest in pursuing this.

BOARD OF REGENTS CHAIR KAZE indicated he likewise would discuss the issue with the Regents.

SENATOR VAN VALKENBURG proclaimed that it should be noted that Mr. Waterman on behalf of the MSU foundation indicated a willingness to participate in that process, adding that the MSU foundation is a player in that potential possibility. He maintained that once a response is filed on behalf of the Land Board, the court is in the position to rule immediately. It would not necessitate a reply from the Board of Regents. Unless there was a stipulation entered into between the parties to request that the court not decide the issue, there could be an immediate decision.

BOARD OF REGENTS CHAIR KAZE proclaimed that the Regents would entertain the stipulation to continue the matter before the court to a later date.

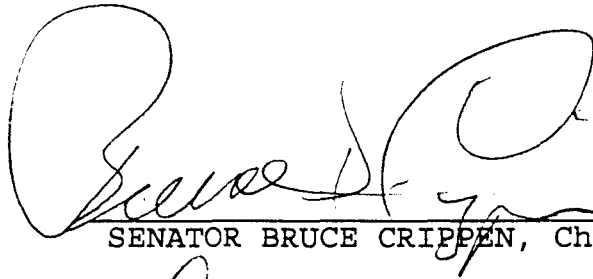
ATTORNEY GENERAL MAZUREK indicated he was not in a position to agree with that and added that he was under instructions from the Land Board to file a response as drafted in the next day. He proclaimed that counsel for the parties need to pursue the matter as well as other Land Board members agreeing to the process.

SENATOR VAN VALKENBURG, responding to Mr. Best's allegation about the committee composition and the manner in which the committee proceedings were conducted, stated that Mr. Best's approach to ethics is not one shared by 90 percent of all Montanans. He added that Montanans have a great respect for one another, a great respect for their responsibilities and roles. He reiterated his belief that he did not have a conflict of interest in this matter nor was anyone else acting other than in the best interests of the public.

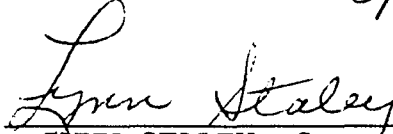
CHAIR CRIPPEN adjourned the meeting at 12:00 noon.

ADJOURNMENT

Adjournment: 12:00 Noon

A large, stylized handwritten signature in black ink, likely belonging to Senator Bruce Crippen, positioned above a horizontal line.

SENATOR BRUCE CRIPPEN, Chairman

A handwritten signature in black ink, likely belonging to Lynn Staley, positioned above a horizontal line.

LYNN STALEY, Secretary

BC/lis

STATEMENT PROVIDED TO THE MONTANA SELECT LEGISLATIVE COMMITTEE

A Joint Committee Seeking to Resolve Land Board - Board of Regents Differences

February 6, 1997

Provided by: Franklin D. Culver and Richard E. Duncan

THE LAND BOARD TOOK APPROPRIATE ACTION TO INVALIDATE THREE LAND EXCHANGES EXECUTED BY THE MONTANA UNIVERSITY SYSTEM

The Montana Board of Land Commissioners took appropriate action in November 1996 to seek to invalidate three land exchanges between Montana State University and Montana State University Foundation, Inc. Land Board members devoted much time to listening to citizens concerns and reviewing the factual record regarding these exchanges. We commend the Land Board for now seeking to invalidate the exchanges in court. Certainly the Board of Regents should follow the Land Boards lead.

BOARD OF REGENTS NEEDLESSLY DISPOSED OF UNIVERSITY LANDS

The Montana Board of Regents, upon the request of Montana State University - Bozeman violated the Montana Constitution when it traded certain state-owned lands to the Montana State University Foundation, Inc. In a series of three exchanges, the Regents exchanged the following state-owned properties, but did not obtain equal value for the State in return.

- (1) 151.9 acres of state-owned campus property. This property was a significant part of the Montana Agricultural Experiment Station's (MAES) Livestock Teaching and Research Center;
- (2) a Bozeman residence for the University president; and,
- (3) a one acre adjacent to the campus.

These state owned lands were disposed of in land exchanges that occurred in 1980, 1986 and 1990 between the University and Montana State University Foundation.

MAES LIVESTOCK CENTER LANDS AND FACILITIES WERE DEDICATED AND
NEEDED FOR AGRICULTURAL INSTRUCTION AND RESEARCH

The Livestock Center lands had been purchased using Montana Agricultural Experiment Station (MAES) money and state funds. These lands were permanently dedicated to the MAES's educational research programs and the Animal and Range Science Dept. programs. The MAES campus lands have not been declared excess, surplus or not needed for education. In fact, MAES officials and Animal and Range Science Department faculty have repeatedly made the point that losing any Livestock Center lands would hurt their educational and research programs. Their concerns went unheeded and University-Foundation land exchanges have proceeded.

FOUNDATION IS A CHARITABLE ORGANIZATION AND HAS A FIDUCIARY DUTY TO
ITS SUPPORTED UNIVERSITY

The Montana State University Foundation, Inc.. is a tax-exempt, charitable organization. The Internal Revenue Service has determined the Foundation to be a § 509(a)(3) supporting organization. The Foundation must therefore be organized and operated exclusively and solely to support and benefit the University.

Charitable gifts to the Foundation are held in trust for the benefit of the University. Charitable gifts given to the Foundation must be used for charitable purposes. The Foundation, has a fiduciary duty to the University regarding charitable gifts obtained by the Foundation for the University's benefit.

The Foundation solicits charitable gifts for the University and tells donors they are supporting the University. A Foundation brochure entitled Supporting A Future Of Excellence, undated, explains how this fiduciary relationship is supposed to work:

"You [potential donors] contribute to the University through the Foundation."

Indeed the Foundation is known notoriously as the University's fund raising arm - and uses the name and insignia of the University in Foundation fund raising activities.

THE FOUNDATION TRADED FOR VALUABLE CONSIDERATION CHARITABLE
PROPERTIES TO THE BENEFICIARY UNIVERSITY

Three gifts of real property, Huidekoper ranch, Lutz farm, and Gardiner residence, were intrusted by donors to the tax-exempt Foundation. The Foundation, a charitable organization and a fund-raising fiduciary for the supported University, accepted these

gifts, and their charitable purposes. The charitable purposes of the properties are:

Huidekoper ranch - "... advancing research in animal diseases and thereby improving the livestock industry of Montana." (Huidekoper Agreement, May 15, 1956.)

Lutz farm - "... to be used exclusively for agricultural research purposes." (Codicil to Last Will and Testament of Helen Walsh Lutz, Aug. 4, 1981.

Gardiner residence - "The gift of this real property and my home constructed thereon is to make said property available on a lease or otherwise basis as a residence for [university faculty or administration] as the grantee may determine in its absolute discretion." (Letter, Henry Gardiner to Endowment and Research Foundation, Montana State University, Dec. 18, 1986.)

The Foundation, as explained above, has a legal fiduciary duty to assure that these charitable gifts are made available to the beneficiary for the restricted charitable purposes. The Foundation failed to do so. Notwithstanding this fact, the Foundation offered to exchange the above charitable properties to the University. And in fact executed business deals with the University trading the above gifts to the University in return for 151.9 acres of campus property. This University property traded was part of the MAES Livestock Center.

UNIVERSITY AND REGENTS PROVIDED QUID PRO QUO TO OBTAIN CHARITABLE GIFTS TO WHICH THEY HELD THE BENEFICIAL (EQUITABLE) RIGHTS

To our knowledge, no facts show that the Foundation, in executing the exchanges, properly disclosed to the University the charitable restriction on the gifts. Neither did they inform the land appraisers of the charitable restrictions on the properties. To our knowledge, the Foundation did not disclose to the University or the Regents that they were holding the properties as a fiduciary and in trust for the University. Facts show that the Foundation only told the University and the Regents that they were the owner of the properties - a misleading statement for a fiduciary to make to the beneficiary University.

The Foundation, claiming to be the absolute owner of the charitable gifts bargained with the beneficiary University to receive state property in the 1980 and 1990 trades for the gifted charitable properties. Thus the gifted properties were not used for charitable purposes. The University, with Regents' approval, overlooking the charitable nature of the gifts, willing - but wrongfully - executed land exchanges with its supporting Foundation. Thus 151.9 acres, associated facilities, and water

rights at Montana Agricultural Experiment Station's Livestock Center facility were needlessly conveyed away to the Foundation. Therefore the state, in these exchanges involving gifts, only obtained gifts in which they already held a estate known as the equitable right or beneficial right.

UNIVERSITY TWICE PAID STATE FUNDS TO OBTAIN GIBSON RANCH

The Gibson ranch, acquired by the University in the 1980 land exchange is a different situation. But, here as well, the University did not have to convey additional state assets to acquire the ranch in the 1980 land exchange.

Facts show that the MAES, in 1960, received the University President's approval to purchase the Gibson ranch. MAES stated at the time that they would operate the ranch and use the generated ranch income to make the mortgage payments. MAES officials further said they would make the down payment MAES funds held for them by the Foundation. Yet, for unknown reasons, University administration officials informed the MAES officials of their decision that the Foundation not the public MAES, would execute the Gibson ranch purchase.

Although the Foundation executed the purchase, the MAES operated the ranch and maintained its facilities. And, as they said they would, the MAES made the payments to pay-off the ranch indebtedness; reimbursed the Foundation for the down payment; and paid the Foundation with interest for all its costs related to the ranch purchase. Facts indicate that the Foundation executed the Gibson ranch purchase for MAES's benefit and knowing that MAES would repay the Foundation for the purchase price. MAES fully repaid the Foundation. Yet the Gibson ranch title remained with the Foundation until the Foundation executed the 1980 land exchange.

However, probably in recognition of the Foundation's fiduciary duties, the University and Foundation, executed an agreement on in 1975, which said, among other things:

"That, if the property [Gibson ranch] is sold the proceeds will be placed in an [Foundation] account for the use of the Montana Agricultural Experiment Station for agricultural research and related purposes."

The Montana Attorney General's office summarizes what has happened this way:

"Annual lease payments by MAES were used to compensate the Foundation for both its down-payment and mortgage payments on the remaining purchase price."

"In summary, the Foundation purchased the Gibson ranch and the purchase price was repaid to the Foundation with MAES funds submitted as lease payments." (Office of Montana, Attorney General, Disposition of Public Lands, Feb. 20, 1996, p. 5.)

After the MAES repaid the Foundation for the purchase price and down-payment. The Foundation failed to convey the Gibson ranch title to the MAES. Instead, the Foundation held the title and a few years later bargained with the University to trade the Gibson ranch for Livestock Center land. A 1980 land exchange occurred. An outcome of the exchange was the University, with Regents' approval, willingly - but wrongly - repaid the Foundation a second time.

CONSTITUTIONAL SAFEGUARDS AGAINST SUCH MISUSE

Montana's Constitution specifically protects the people from such misuses of the state-owned properties. Article X, § 10 requires that the funds of the Montana University system are to:

...forever remain inviolate and sacred for the purposes for which they were dedicated.

[Funds] shall be guaranteed by the state against loss or diversion.

University system state assets, like the Livestock Center lands, that are dedicated to education cannot be indiscriminately diverted and lost to education as was the case with the 151.9 acres of the Livestock Center.

Article X, § 11 mandates that public lands of the state are "... held in trust for the people" and if any of these public lands are exchanged the state must obtain other land "... which is equal in value...."

The state, in these land exchanges, failed to obtain the required equal value. This is because all properties the State obtained from the Foundation in the 1980 and 1990 exchanges were either:

- (1) charitable gifts of real property (Huidekoper ranch, Lutz farm, and Gibson ranch) for the University's benefit.
- (2) a real property (Gibson ranch) for which the University and the Regents paid twice.

The Montana Constitution, at Article II, § 8, guarantees the people:

"the right to expect ... a reasonable opportunity to participate in the operation of the agencies prior to the final decisions."

These land exchanges were executed by the University without meaningful public participation.

CONCLUSION

The Montana Board of Regents continues to state that the Land Exchanges were executed properly and in accordance with Montana laws. However we believe that valuable state-owned assets (151.9 acres of Livestock Center campus lands) acquired for and dedicated to education have been needlessly traded away by the Board of Regents and lost to education. We believe that the Board of Regents failed to obtain the constitutionally required equal value in the exchanges.

We are pleased that the Montana Board of Land Commissioners, with its elected membership, have taken considerable time to establish and then carefully review a factual record. The Land Board has concluded that the three Montana State University - Montana State University Foundation, Inc. land exchanges are seriously flawed. We commend them for taking action at their November 1996 meeting to invalidate these exchanges. We are confident that any court after reviewing the evidentiary record will concur with the Land Board that these land exchanges should be invalidated and an equitable remedy reached.
