IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 08-0506

PPL MONTANA, LLC, a Delaware
Limited Liability Company,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

MONTANA FARM BUREAU FEDERATION AMICUS BRIEF

On appeal from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark

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Montana Farm Bureau Federation ("MFBF") submits this amicus curiae brief on behalf of its 13,000 member families.

STATEMENT OF THE ISSUES

1. Did the District Court err when it determined that the streambeds of navigable rivers are part of the school trust?
2. Did the District Court err when it determined navigability on summary judgment?
3. Did the District Court violate MFBF members' due process and property rights?
4. Did the District Court err in its valuation methodology for the streambed use?

STATEMENT OF THE CASE

The District Court decided a variety of issues in this case; however, Montana Farm Bureau Federation ("MFBF") will only address the determinations regarding navigability, school trust lands, and the valuation of those lands.[1] In these decisions, the District Court determined on summary judgment that the three rivers

[1] The decisions of interest to MFBF are: 8-28-2007 "Memorandum and Order on the Navigability of the Missouri, Madison and Clark Fork Rivers;" 8-28-2007 "Memorandum and Order on Motions for Summary Judgment on Whether the Streambeds of the Missouri, Madison and Clark Fork Rivers are School Trust Lands;" and 6-13-2008 "Memorandum of Decision."

on which PPL Montana's dams sit were navigable at statehood, that the streambeds of the rivers are school trust lands, and that PPL has to pay for their use based upon a "shared net benefits" valuation methodology.

STATEMENT OF THE FACTS

MFBF adopts the statement of facts filed by PPL Montana, LLC.

SUMMARY OF THE ARGUMENT

Historically, in settling and developing the state, Montana's farmers and ranchers have been encouraged to make use of the State's streambeds. Those lands were never subject to the school trust, and MFBF members have never been charged to use them. If this Court were to grant the right to the school trust to demand top dollar for streambed access, it could well spell the end of agriculture in Montana as we know it, and as our ancestors who settled this great State knew it.

In ignorance of this history, case law and the Constitutional Convention record, the District Court has issued an algebraic formulistic ruling based upon Black's Law Dictionary and the interpretation of one word. However, contrary to the District Court's holding, A plus C does not equal Q, or in other words, lands acquired by Montana pursuant to the Equal Footing Doctrine are not the same as lands acquired pursuant to the Enabling Act.

MFBF members did not participate in the District Court case because they had no notice or any way to know that the District Court would issue a ruling that

would undermine a century of history and precedent to change the property rights allocation in Montana. Now, they appear as Amicus Curiae in an attempt to secure private property and due process protections.

MFBF's amicus brief addresses four different but related errors by the District Court. First, the District Court wrongly equated navigable streambeds ("streambeds") with school trust lands. Second, the District Court determined without proper evidence on summary judgment, and without sufficient notice to affected landowners, that three rivers (Missouri, Madison and Clark Fork) were navigable at statehood and thus property of the State. Third, the District Court's determination to reclassify the beds of the three rivers is a reapportionment of property in violation of MFBF members' due process and private property rights. Lastly, even if the streambeds were navigable,and part of the school trust, the District Court erred when it valued a leasehold interest in them using a profit sharing analysis.

ARGUMENT

1. Streambeds and School Trust Lands are Not the Same

a. Streambeds are not school trust lands.

The District Court correctly interpreted the Equal Footing Doctrine to find that the title to lands underlying navigable waters automatically vested in the State of Montana upon admission to the Union. School Trust Lands Order at pg. 4.

However, the District Court then erred when it equated the "lands underlying navigable waters" or streambeds to "school trust lands." Id. at pg. 6.

"School trust lands" are very different than streambeds. The "school trust lands" were granted to the State of Montana pursuant to the Enabling Act and not pursuant to the Equal Footing Doctrine. See State ex. rel. Galen v. District Court (1910), 42 Mont. 105, 112 P. 706, 707. The portion of the Enabling Act, section 10, is very precise and provides in part: "state school lands can only be disposed of in accordance with the terms of the grant to the state, the Constitution, and general laws consistent with both." Id. The Galen case treated "school trust lands" and streambeds differently.

In later cases, the Court has also held that "school trust lands" are unique. In Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133, the Court found that the rules for other state lands do not apply in respect to school lands granted to the State by the United States. Also, in Department of State Lands v. Pettibone (1985), 216 Mont. 361, 372, 702 P.2d 948, 955, the Court explicitly stated, "school trust lands are subject to a different set of rules than other public lands." Thus, the Pettibone Court found that school trust lands are held in trust for a very specific purpose. There is no court ruling that streambeds are held in trust as school trust lands. Clearly, based on past precedent, "school trust lands" are very different than the streambeds.

Instead of relying upon past precedent, the District Court decided that the controlling issue was the meaning of the term "'grant' as used in Article XI, Section 2, of the 1889 Constitution and Article X, Section 2, of the 1972 Constitution." School Trust Order at pg. 4. The District Court determined that "Article XI, Section 2, and Article XVII, Section 1, of the 1889 Constitution contained similar language." Id. at pg. 5. Based upon Black's Law Dictionary's definition of "grant," the District Court found that Article X, section 11(1) "describes all lands which have been transferred to the state through the action of Congress." Id. at pg. 6. The District Court erred by ignoring the earlier cases interpreting and applying the Enabling Act.

This Court has stated, "when the legislature enacts a statute, it is presumed that the legislature acted with full knowledge of the law on a subject, and with full awareness of the construction statutory terms have been given." Ross v. City of Great Falls (1998), 297 Mont. 377, ¶ 17, ¶ 19, 967 P.2d 1103, ¶ 17, ¶ 19; Baitis v. Department of Revenue (2004), 319 Mont. 292, ¶ 24, 83 P.3d 1278, ¶ 24). As shown above, prior to the 1972 Constitution, this Court had interpreted the Enabling Act and the meaning of "school trust lands" in Montana. The District Court's interpretation is to the contrary, which means it failed to presume the Convention delegates had full knowledge of the law at the time they promulgated the new constitution. If the District Court had correctly presumed that the

delegates had knowledge of the law, it would have cited case authority instead of the Black's Law Dictionary for its holding.

Contrary to the District Court's unique, algebraic formula interpretation, the Montana Constitutional Convention delegates treated river beds and school trust lands differently. In the process of drafting Article IX, Section 3, the delegates considered the concerns of farmers and ranchers across the State that the new Constitution might change their rights. To avoid any chance of that, the delegates "felt it very important to preserve 80 years of more of water law litigation," and thus made only non-substantive, grammatical changes to the pertinent language of the 1889 Constitution. See Constitutional Convention Verbatim Transcript, March 2, 1972 , p.1303.[2]

The delegates also adopted the "grandfather" clause in Section 3(1), confirming "[a]ll existing rights to the use of any waters for any useful or beneficial purpose." Mont. Const., Art. IX, Sec. (3)(1). It was exclusively in this context of Article IX that the delegates discussed navigable streambeds. There is no mention of either the School Trust or the Enabling Act in the parts of the Convention record where streambeds are mentioned. Id. at pp. 1303-1351.

Opposite to the District Court's rationale, when school lands and the school trust were discussed by the delegates it was in the process of promulgating Article

[2] The Convention Notes and Verbatim Transcript are available at: http://www.montanacourts.org/library/mt_law.asp#constitutional

X. There, when the Section 16 and 36 lands were discussed, the Enabling Act was mentioned. See, e.g., Verbatim Transcript, March 13, pp. 2143- 2150. In this part of the Convention notes, there is no mention of the navigable streambeds. Again, the delegates were concerned with not changing history, and felt that the original constitution provided the necessary protection for the public school fund. Thus, the language changes in Article X were stylistic only and were not meant to work the changes adopted by the District Court, but instead were meant only "to serve the cause of comprehension," and did "not alter substance." Constitutional Convention Notes, Vol. II, p. 1002; Vol. VII, p. 2593.

Federal authority is also totally opposite of the District Court's new Black's Law formulaic theory. The District Court ruled that Article X Section 2(4) of the 1972 Montana Constitution does not apply to the streambeds; however, Article X, Sec. 11(1) of the 1972 Montana Constitution uses the term "granted" to encompass all lands transferred by Congress. The District Court then held: "[w]hile the underlying basis for transferring title [to navigable streambeds] is the Equal Footing Doctrine, the transfer could only be accomplished through the Enabling Act which was an act of Congress." School Trust Order at pg. 6. By this artifice, the District Court concluded that because they were "transferred" by Congress via "an act," the streambeds are part of the public land trust "held in trust for the

support of education … .” Id. As shown below, United States Supreme Court precedent is plainly to the contrary.

The case law on the Equal Footing Doctrine all discusses the vesting of streambeds as state sovereignty lands immediately upon statehood, with no need for an act of Congress, and holds the United States loses all rights over Equal Footing streambeds at the instant of statehood. In the seminal case on that doctrine – Pollard’s Lessee v. Hagan, 44 U.S. 212 (1845) – the Supreme Court held:

> when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them [and since] admitted into the union on an equal footing with the original states, [the same rule applies to Alabama]. Then to Alabama belong the navigable waters, and soils under them … and no compact that might be made between her and the United States could diminish or enlarge those rights. [Thus] the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States but were reserved to the states respectively [and] the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to plaintiffs the [streambed] land in controversy in this case.

Id. at 229-30. See also Shively v. Bowlby, 152 U.S. 1, 46 (1894) (“title to the shore and lands under water is regarded as incidental to the sovereignty of the state … and cannot be retained or granted out to individuals by the United States”).

The District Court’s creative ruling that the streambeds were transferred by the Enabling Act also runs afoul of Supreme Court holdings regarding Enabling

Acts. Enabling Act lands do not transfer immediately to the State as the District Court held. Rather, those lands can remain subject to the right of the United States to retain or transfer them to someone other than the State, long after statehood, depending upon when the lands in question are surveyed. As explained by the U.S. Supreme Court in Andrus v. Utah, 446 U.S. 500 (1980):

> it has consistently been held that under the terms of the grants [*i.e.*, Enabling Acts] hitherto considered by this Court, title to unsurveyed sections of the public lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. Prior to survey, those sections are part of the public lands of the United States and may be disposed of by the Government in an manner and for any purpose consistent with applicable federal statutes."

Id. at 507, n.8.

In Montana and other western states, the official surveys were not completed until well into the 20th century. See, e.g., Addendum, Exhibit 1 (U.S. Department of Interior Survey plat showing 1930 survey dates for portions of the Madison River that the District Court declared navigable at statehood). Thus, if the District Court were correct and the streambeds were transferred by the Enabling Act, they could have been retained by the United States, or transferred to someone else, after statehood (but before surveying).

Of course, that would be entirely inconsistent with the holdings in the Equal Footing cases, discussed above, that the United States had no such power over navigable streambeds after a state's admission to the union. Simply put, under

federal law, streambeds cannot be Enabling Act lands because the rules governing sovereignty streambeds are entirely inconsistent with the rules governing Enabling Act lands.

Thus, because it is contrary to this Court's precedent, to U.S. Supreme Court precedent, and to the intent of the 1972 Convention delegates, the District Court's order that navigable streambeds are owned by the school trust must be reversed.

b. The Potential Consequences of the District Court's Ruling are Horrific for MFBF Members.

Even more worrisome than the District Court's errors of law are the consequences of its ruling on MFBF's members. If streambeds were to become part of the school trust, Montana law would require the State to acquire top dollar for leases. Nothing would prevent the State from – for example – selling leases to parties who would make streambeds exclusive for their rich fly-fishing clients, and exclude farmers and ranchers from accessing their diversion structures. Unlike hydro owners, farmers and ranchers do not have F.E.R.C. licenses that give them federal rights to have structures on navigable streambeds, which means that the diversion and impoundment structures of farmers and ranchers may be even more negatively impacted than PPL's structures by the District Court's ruling.

Water rights with priorities stretching back to the earliest days of Montana history could become valueless with no ability to access the water. If DNRC tried to keep lease costs affordable for long-time users, Montrust would likely sue – as it

did in Montanans for the Responsible Use of the School Trust v. State ex. rel. Bd. of Land Comm'rs, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 – to force the State to stop such preferences and sell leases at whatever rate the market would bear.

In many areas of this state, streambed land is valued at a premium well beyond agricultural uses. Farmers and ranchers cannot afford this extra cost. Also, if the State succeeds in requiring lease payments from the federal government for its irrigation projects, it is the farmers and ranchers who rely on those projects who will end up bearing the pass-through costs.

Streambeds have never been lands for which the State has been required to recover top dollar. As DNRC's own counsel has said:

> Navigable waters was not granted to the State of Montana, they are lands held by the state by virtue of its sovereignty under what is called the Equal Footing Doctrine. … **The distinction is important.** If lands are granted, those are school trust lands. **Lands that are held by means of sovereignty are just sovereign lands of the state. We're not under a trust obligation to get full market value.**

(DNRC Counsel, Tommy Butler, Testimony to State Land Board, April 19, 2004, p.5 of Minutes) (emphasis added).[3]

Under the District Court's ruling that the streambeds are school trust lands, the existing policy and practices would no longer be applicable. MFBF's members ask this Court to consider the consequences as it decides this appeal. Locking

[3] The 2004 Minutes of the Land Board are on the DNRC's website at http://dnrc.mt.gov/commissions/land_board/2004/2004_meetings.asp

streambed lands under the "trust obligation to get full market value" could be the death knell to agriculture in this state.

2. Navigability is a Trial Issue.

MFBF's members are also concerned about the District Court's rulings on navigability. The August 28, 2007 Navigability Order is troubling to MFBF. It appears the District Court ignored multiple facts of non-navigability on summary judgment, including expert affidavits, to award title to the State as against PPL Montana and the other private parties who live along the river sections in question. Because MFBF's membership is so widespread, it is likely the District Court divested some members of title to streambed land, which until this case they owned.

At this point, the State claims 37 rivers (or portions thereof) in the State to be navigable.[4] MFBF believes this list is a serious overreaching by the State, and many of its members would dispute the State's navigability claims. It is not just MFBF. The State's earliest version of this list was apparently created in 1988. On August 26, 1988, the Acting State Director of the federal Bureau of Land Management contacted the then Commissioner of the Montana Department of State Lands ("DSL"). On behalf of the United States, the letter informed Montana as follows:

[4] The current list of claimed navigable rivers is on the DNRC's website at http://dnrc.mt.gov/trust/MMB/NAVWATERSLIST2CONNIE.pdf

> The purpose of this letter is to place the State of Montana on notice that [the United States] does not agree with the DSL's determination of the navigability of these waterways. ***
>
> At this point in time, the United States only recognizes portions of the Missouri, Yellowstone, and Big Horn Rivers within the State of Montana as being navigable for title related purposes.

(Aug. 26, 1988,, Brubaker to Hemmer; copy attached as Addendum Exhibit 2).

It must be remembered that navigability disputes in Montana are always an attempt by the State to take title unto itself and away from private parties (or the United States when it's a riparian owner), who own non-navigable streambeds to the middle of the stream. Section 70-16-201, MCA. Of course, title is a precious property right, worthy of respect and protection by the courts.

When the federal government disagreed with the State of North Dakota over whether the Little Missouri River was navigable for title at statehood such that ownership of its beds passed to the state, the Eighth Circuit Court of Appeals explained the proper, rigorous test for such a title dispute:

> [T]he question of whether a river was navigable at the time of statehood is one of federal law. ***
>
> At trial, **the State ha[s] the burden of proving by a preponderance of the evidence that the [river] was navigable at time of statehood** [and is] required to prove that the River (1) was used or was susceptible of being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and (4) by the customary modes of trade and travel at the time of statehood.

State of North Dakota v. United States, 972 F.2d 235, 237-38 (emphasis added). In ruling against North Dakota on title navigability, the federal courts properly protected private title holders in that state, along with the United States. Id. at 240. The District Court here relied in large part on what it called "admissions" of the parties. Navigability Order at pg. 8, 10, 11. This is disquieting. While all parties along a river might not technically be bound by a single court decision that a river was navigable at statehood, the reality is that such a decision is generally a *fait accompli*. Most private parties do not have the resources to hire experts to mount a navigability challenge. Thus, if the State is not initially held to the appropriate burden by the courts, most private parties stand little chance of protecting their title because the burden of proof will effectively have shifted to them to prove non-navigability.

Allowing admissions of one private owner along a river to bind all of them, cannot be right. In fact, use of such admissions of law to decide summary judgment is contrary to Montana law. See, e.g., Firelight Meadows v. 3 Rivers Telephone Cooperative, 2008 MT 202, ¶18, 344 Mont. 117, 186 P.3d 869 (the court properly ignored an admission in a pleading that an agreement was a loan because "a loan is not a factual allegation; it is a question of law – a legal determination for a court to decide"); and Larson v. Green Tree Financial Corp., 1999 MT 157, ¶17, 295 Mont. 110, 983 P.3d 357 (the court properly ignored an

admission in discovery of "the existence of a contract" because "the existence of a valid express contract is a question of law to be determined by the court"). Moreover, the United States would certainly not be bound by a private party's admission. Thus, if this Court were to affirm a decision that fails to follow the appropriate federal navigability rules, it could grant title to the State to the streambed lands of private parties. Then, on the same portion of the river, the federal government could go to federal court – as it did against North Dakota – and secure a ruling on its behalf that, the State does **not** own title to the streambed. In its 1988 letter, BLM warned the State that is precisely what it would do. (Addendum, Exhibit 2 – "should the need arise," BLM will "defend the United States title"). The possibilities for chaos are staggering, and title to property is one area where all agree that certainty is key.

It is a court's duty to decide title navigability as a matter of federal law, using the appropriate evidentiary standards. North Dakota at 237-38. Montana must actively **prove** its title to a streambed, not rely on pleading rules. Anything less, like the ruling in this case, cannot be allowed to stand because it is unfair not only to the parties, but to all property owners along the river in question.

The District Court's ruling on the Madison River is also problematic. The District Court admits a "sparse historical record," yet concludes the State has proved navigability based on current recreational use, a single log drive on a part

of the river on which neither of the Madison River dams are located, and on unspecified evidence that "Hebgen Lake has been navigated." (District Court's Navigability Order at pg. 11). This is precisely the type of evidence that the North Dakota court rejected under the proper federal test. 972 F.2d at 238-240. A simple Google search shows that Hebgen Lake was created by construction of the Hebgen dam in the early 20th century. Since the lake did not even exist in 1889, its navigation cannot prove anything about title at the time of statehood.

If this Court were to affirm the District Court on the record before it, it will have established that Montana title is worthy of lesser protection by our courts, than is title in North Dakota by the federal courts. That cannot be so. This Court must ensure that the State is scrupulously held to the proper test when claiming title to streambeds. Anything less will sell the title of countless Montanans, including many MFBF members, "down the river."

3. The District Court's Ruling is a Judicial Takings

Prior to the District Court's ruling, MFBF members and other landowners along the relevant portions of the Missouri, Madison and Clark Fork Rivers owned the streambed to the middle of the river. Section 70-16-201, MCA. Now, as a result of the District Court's ruling, MFBF members have been divested of those rights and only own the streambeds to the low water mark. Furthermore, the State claims another 34 rivers in the same list relied on by the District Court. The

imprimatur of the District Court on that list will surely embolden the State to try and further reallocate MFBF members' property rights.

More than two decades ago the U.S. Supreme Court held that, "[p]roperty interests . . . are not created by the Constitution. Rather, they are defined by existing rules or understandings that stem from an independent source such as state law." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (*quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). The Federal Circuit Court of Appeals has stated, "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment," which interests instead are defined by "'existing rules or understandings' and 'background principles' derived from an independent source, such as state, federal or common law." Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed.Cir.2003)(*quoting* Lucas, 505 U.S. at 1030).

Based upon almost 100 years of history, precedent, and Constitutional Convention notes, MFBF members and their ancestors or predecessors in interest have relied upon the law for ownership of non-navigable streambeds. Now, in a very short, uniquely reasoned decision ignoring history and precedent, the District Court has issued a ruling that takes MFBF member's and other's property without just compensation.

The United States Supreme Court has suggested that the judicial branch, like the executive and legislative branches, must provide procedural due process when changing existing principles. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364-66 (1932); Brinkeroff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-81 (1930). The Montana Constitution provides that private property shall not be taken or damaged for public use without just compensation. Mont. Const. art II, § 29; see also United States Const. art V. Also, both the Montana and the United States Constitutions provide for due process protections. Mont. Const. art II, § 17; see also United States Const. art XIV.

Constitutional protections for private property and due process were violated by the District Court's reapportioning of property by judicial decree in ignorance of precedent, history, and the intent of the delegates at the Constitutional Convention. MFBF's members and other property owners along the rivers are entitled to those protections. Therefore, the District Court's holding must be reversed, or remanded back to the District Court with notice, and with every affected landowner in Montana given the opportunity to appear and to receive just compensation.

4. The District Court's Valuation Decision is Troubling.

Finally, MFBF's members are also concerned about the District Court's rulings on lease valuation methodology. As MFBF understands the District Court's decision,

it ruled that the State was entitled to a large share of the hydro owners' profits under a theory of valuation called "shared net benefits." Memorandum of Decision at 8-10. In the collective memory of the MFBF membership, profit-sharing has never been a method for valuing leases for state-owned lands, whether owned by the School Trust or not.

The District Court's stated rationale for applying "shared net benefits" is that "the Land Board must secure the largest measure of legitimate and reasonable advantage to the state." Memorandum of Decision at pgs.8-9. MFBF believes there is nothing "legitimate" or "reasonable" about analyzing profit to value land. Indeed, it is plainly contrary to history and custom, and to MFBF's mission to support the free enterprise system and protect individual freedom and opportunity in this country and this state.

As this Court knows, there is a long history of the State basing lease value on such things as Animal Unit Months (AUMs) as a way to value the grass on a given tract of land. See, e.g., Kalfell Ranch, Inc. v. Prairie County Co-op State Grazing Dist., 2000 MT 317, ¶6, 302 Mont. 492, 15 P.3d 888 (explaining the AUM valuation system). Is the State now suggesting that if one rancher, through good stewardship, makes a profit on cattle that graze on an inferior plot, he should pay more to the State than another, who through poor stewardship, makes a lesser profit on a better tract? That would seem to be the theory of "shared net benefits."

The theory raises troubling questions. What if, in a given year, the lessee makes no profit, can he forego his lease payments to the State? If a retail store constructed on a Section 36 tract has an off year and loses money, does the State pay it or recover nothing? If the State does not truly share in profits **and** losses, it is not really profit-sharing, but profit gouging. The whole "shared net benefits" idea is fraught with difficulty and plainly unworkable.

In Winchell v. Department of State Lands (1988), 235 Mont. 10, 15, 764 P.2d 1267, 1270, this Court rejected the idea that a valuation methodology can be used "simply because it is more profitable to the state fund." The District Court's rationale for adopting the "shared net benefits" methodology seems to have been precisely that – get the most money for the State as possible. Memorandum of Decision at pp. 8-9. Under Winchell, this Court should reject the method, and avoid the madness that would surely follow if Montrust began to file lawsuits arguing that profit sharing analyses should be used to value school trust lands.

CONCLUSION

For the foregoing reasons, MFBF asks this Court to reverse the District Court's rulings that the streambeds are school trust lands, its summary judgment on title navigability, and its adoption of a profit-sharing valuation analysis for state lands. MFBF's members trust that this Court, unlike the DNRC and Attorney

General's office, will remember the history of this state and give due consideration to the interests of its farmers and ranchers.

DATED this ___ day of February, 2007.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was served upon the following by mailing a true and correct copy thereof via U.S. mail, postage prepaid, on this ___ day of February, 2009, postage prepaid and addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, is 4,961 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Dated this ____ day of February, 2009.

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