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COMMISSIONER OF HIGHER EDUCATION

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TO: Board of Regents
FROM: LeRoy H. Schramm, Chief Legal Counsel
RE: Lawsuit Regarding Administrative Charges Against University Land Grant Income
DATE: March 16, 2003

This memo relates to item "c" of part VII (System Issues) on the Board agenda for March 20 & 21, 2003. The item was mistakenly labeled "Timber Sales" initially, but it should instead be relabeled "Administrative Fees on Land Grant Revenues".

Background

At its July, 2002 meeting the Board the Regents considered for the first time the issue of whether statutory deductions from University Land Grant income used to fund the administrative operations of other state departments (primarily the State Lands Division of the Department of Natural Resources and Conservation) were consistent with the state constitutional requirement that "the funds of the Montana University System . . . from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated." Art. X, Sec. 10. At that meeting I presented a memo to the Board (found at <http://www.montana.edu/wwwbor/ITEM116-102-R0702.htm>) that included a history of the increasing number of administrative charges that have been levied against the University land grant income from 1963 to the present. The memo also reviewed case law from various states and concluded that, based on both state and federal law and Montana's very strong constitutional language, there is a good chance that some or all of the assessments would be found illegal.

The Board then instructed me to prepare a draft Complaint of the kind that would be filed if the Board were to take legal action to end the assessments and seek repayment of past assessments. At the September, 2002 meeting I presented the draft of such a Complaint to the Board (found at <http://www.montana.edu/wwwbor/ITEM116-106-R0902.pdf>). One question that arose at that meeting was the magnitude of the funds that had been lost by the University Land Grant Trust Funds over the many years the administrative assessments were made. At that time we were still awaiting an accounting of those fees from the Department of Natural Resources and Conservation. In part because of this uncertainty the Regents deferred authorizing the filing of any legal action. In October we received the desired information and an analysis follows.

The Value of the Fees Taken

Prior to 1963 all costs of administering the University land grants were paid for by state general fund revenue. The first administrative fee assessed against University land grant income was called the Forest Improvement Fee. In forty years (1963 through fiscal year 2002) that fee has amounted to \$3,872, 815. The Resource Development Fee (begun in 1967) has totaled \$612,690. The Board of Investment management fee (begun in 1997) has totaled \$19,228. The Trust Land Administrative Fee (begun in 1999) has totaled \$527,023. The total of these four fees is \$5,031,756. If one applies the statutory rate of interest to the fees paid each year the present value of the fees taken from the University land grant trusts is approximately \$11,300,000.

It is useful to compare the magnitude of the fees against the annual income generated by University land grants. As of the end of fiscal year 2002 (June 30, 2002), the University land grants totaled 331, 255 acres (see annual DNRC report at <http://www.dnrc.state.mt.us/trust/tlmdhome.htm>). This generated approximately \$4,463,000 in income of which \$1,436,959 went back into the permanent trusts, \$2,543,233 was distributed to the campuses and approximately \$483,500 was paid in administrative fees (for the trust by trust totals of the monies going into the trusts and to each campus see <http://www.dnrc.state.mt.us/trust/tlmdhome.htm>). The administrative fees assessed in fiscal year 2002 were typical. Over the last three fiscal years (including 2002) the fees have amounted to \$1,275,153, or an annual average of \$425,051.

The amount of money in the University land grant permanent trust funds at the end of fiscal year 2002 was \$21,448,076. That means that the that the \$5,031,756 in fees taken since 1963 amounts to over 23% of the current trust funds balance. If one uses instead the present value of the 40 years worth of fees (\$11,300,000) the percentage is over 52%. As noted in the July, 2002 memo cited above there is some reason to believe that this entire sum may be recoverable because no statute of limitations can protect a constitutional violation of this sort. That same memo notes that the argument against administrative fees is especially strong with regard to the trust fund derived from so-called federal Morrill Act land grant income (about 10% of our total). In 1999 the State of Washington agreed to pay Washington State University over \$50,000,000 to reimburse the University for years of improper administrative assessments on that University's Morrill Act land grants (see WSU press release at <http://www.wsu.edu/IR/wsulegis/olympia/99-15.htm>). The same federal law that mandated that result in Washington also is applicable to the Montana. In addition, Montana has uniquely powerful constitutional language that applies to all the University System land grants.

Conclusion

The Regents are the trustees of the University System. They have an obligation to safeguard the assets of the University System and to assure that the assets due the System are received and used in a manner consistent with law. The practice of assessing administrative fees on University land grant income is arguably violative of the state constitution and state and federal law. It is my opinion that under those circumstances the Regents must take some action to seek a determination of the legal status of assessments against University land grant income. If the practice is determined to be legally infirm the Regents have further obligations to both seek an end to the practice and to seek restitution for the lost funds. A lawsuit is not the only way to solve this problem, but it is a sure way to get a definitive determination of the legal questions raised by the practice of administrative assessments.