

TESTIMONY TO ENVIRONMENTAL QUALITY COUNCIL (EQC) – January 12, 2012

Mr Chariman, Members of the Committee:

My name is Jerry Swenson and I am here today on behalf of the Montana Leaseholders Association and we represent 200+ cabin site leaseholders.

SB409, reforming the cabin site lease program was passed with overwhelming, bi-partisan support in the 2011 legislature. The Montana Leaseholders Association wrote the initial plan and worked with the bill drafter to prepare it for the Legislature. We know the language of the bill, the intent of the bill and the program the bill was to implement.

The Leaseholders brought the bill to the Legislature to create a true market-based rental system, to bring stability to the cabin site lease program, to help Leaseholders either keep their leases or be able to sell their improvements, and to stop the bleeding with the increasing number of vacant lots.

The Rules passed by DNRC and the Land Board destroy the program set out in SB409 and discourage Leaseholders from using it. SB409 will never have a chance to work.

Last June we began asking DRNC about the status of the Rules and asked to be included in the rulemaking process. We were finally able to meet with DRNC in September, but they had no draft rules to discuss and the issues we brought up were ignored. We were never able to be part of the drafting of the rules and our numerous comments during the rules hearings were again ignored—it was as if we had not made them at all. Legislators, both Democrat and Republican, made comments opposing the Rules, and that did no good, either.

The Rules as passed make **blatant** changes to the law passed in SB409. For example:

**\*\*SB409** Section 1(b)(iv) and Section 2(2) both say: “the lease fee for each subsequent year must be adjusted using the average annual consumer price index as published by the U.S. bureau of labor statistics.”

However, new Rules III says “the annual lease fee ...will equal the most recent appraised value of the cabinsite as determined by the DOR multiplied by the rolling neighborhood average lease rate effective for that year, PLUS an annual adjustment equal to the CPI.”

**\*\*SB409**, Section 2 - Transition says that once information was gathered from the leasing of vacant lots, “the board shall offer all existing cabin site lessees the option of 15-year lease contracts based on the rental market valuation process provided in Section 1.”

However, the new Rules call for a supplemental lease if a Lessee chooses to transition in at the current geographic average, and then the lessee is placed in a pool and at some point which is undetermined the property they lease goes up for open bid. All of this is undefined so leaseholders have no idea how this will function. Not only are the new rules very confusing, but then you add a great deal of uncertainty to the program.

There are other areas in the new rules that significantly change SB409, but in the interest of time, I will only point out those two.

The bill sponsor Senator Tutvedt has not opposed these terrible Rules with us and has indicated some support—that, in turn, has hurt our position. We strongly disagree with Senator Tutvedt.

Senator Tutvedt agreed with our bill as it worked its way through the legislative process, and did agree to some amendments at the time. But the Rules should now follow the law as passed and implement the law. We always said that SB409 may need to be slightly modified next Session, **but the Rules should not make new law, the legislature should.**

The true, current annual loss to the beneficiaries with a 10% vacancy rate has not been provided by the DNRC, no matter how many times we have asked. They have many of excuses, like "some of those lots have never been leased" and others. The DNRC has stated that they maintain the vacant lots—we know they do not. They spent at least \$30,000 on an outdated Duffield study—that money should have been spent on the lots themselves.

**SB409 is no longer the bill that was passed by the 2011 Legislature.** We realize it may be too late for the EQC to do anything to help change these poorly determined and complex rules. But we wanted you to know that because of them, the Cabin Site Program will continue to be in a mess and everyone loses—both the Leaseholders and the Beneficiaries.

Respectfully Submitted:

Jerry Swenson  
On behalf of the Montana Leaseholders Association

*This is an unofficial copy of the latest version of ARM 36.25.1016 through 36.25.1021 as adopted in MAR Notice 36-22-158 on January 12, 2012. These rules became effective on January 13, 2012, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

### **NEW RULE I (36.25.1016) COMPETITIVE BIDDING**

(1) Subject to all the provisions of ARM 36.25.1016 through 36.25.1021 and 36.25.1009, except as provided in (8), the department shall use a process of open competitive bidding to issue a lease upon a cabinsite upon unleased state lands; or when the cabinsite lessee initiates the competitive bid process under this rule; or upon renewal of a cabinsite lease.

(2) In consideration of the board's constitutional fiduciary responsibility to prudently attain full market value and to act in the best financial interests of the affected beneficiary institution, the department may, in its sole discretion, determine the number of cabinsites to be offered for competitive bidding at a given time in a given area, and the duration of the marketing period for each vacant cabinsite to be bid. The department shall determine the timing and duration of the marketing of a vacant cabinsite within 180 days from the date the cabinsite becomes vacant.

(3) When the department solicits offers to lease the premises of a cabinsite through an open competitive bidding process the initial minimum bid shall be two percent of value of the cabinsite premises as established by the most recent Montana Department of Revenue (DOR) statewide periodic appraised value.

(a) There shall be no preference right granted to a former lessee to meet the high bid.

(b) If no bids are received within 180 days of the board's solicitation of offers to lease a cabinsite through open competitive bidding that meet or exceed the minimum bid set by the board, the board may reduce the minimum bid incrementally until a bid is received.

(4) The asking price for the improvements on the cabinsite lot will be established per ARM 36.25.1005.

(5) If the former lessee and the new lessee have not reached an agreement to permanently transfer possession or ownership of the cabinsite lease improvements and cannot agree upon the value of any improvements affixed to any cabinsite lease premises to be acquired by the new lessee within 120 days of the department's acceptance of the new lessee's lease bid, the value of those improvements to be paid to the former lessee by the new lessee shall be established according to the standards and procedures set out in 77-1-208(4), MCA and ARM 36.25.1005.

(6) Provided that the lessee is in compliance with the terms and conditions of its lease, and the department determines it is in the best interests of the affected trust beneficiary to renew the lease, a lessee whose lease is set for renewal may either:

(a) request to have the lease competitively bid as provided in this rule; or

(b) apply to the department to have the lease renewed for 15 years with terms and conditions, including the lease fee specified therein, consistent with ARM 36.25.1001 through 36.25.1013.

(7) Where a lessee requests that the lease be competitively bid, that request will result in a change of the lease fee calculation methodology to that specified in ARM 36.25.1018. The competitive bidding for an existing cabinsite lease will occur during the period from April 1 through September 30 of each year. The number of leases available for bid statewide is at the discretion of the board, but shall be consistent with 77-1-235 and 77-1-236, MCA. The department may use the following standards to determine how many lease lots are available for bid.

(a) In any given geographic location a maximum of three lease lots or ten percent of the total number of lease lots in that geographic location, whichever is greater, may be available for competitive bid when the lessee requests that the lease be competitively bid.

(i) If ten percent of the lease lots in a geographic location is a fractional number, the number shall be rounded down to the nearest whole number. After applying these criteria, if the requests to

*This is an unofficial copy of the latest version of ARM 36.25.110 as amended in MAR Notice 36-22-148 on November 28, 2011. These rules became effective on December 9, 2011, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

put lease lots out for bid exceeds ten percent or three of the total number of lots in a geographic location, whichever is greater, the bid requests will be selected by a random drawing.

(8) When a lease is competitively bid:

(a) the lessee will not have a preference right to match the high bid;

(b) the existing lease agreement will remain in effect until a new lease agreement is completed or the lease is cancelled:

(i) the lessee must be current on its payment of the annual lease fee prior to, and during the competitive bidding process, or the lease may be cancelled; and

(ii) if the lease agreement is cancelled during the competitive bidding process, the department may terminate or continue the bidding process, in its sole discretion;

(c) the department will notify any individual or entity that has filed a security interest in the cabinsite lease or improvements with the department. Lessees must notify any individual or entity that holds a security interest. The lease will not be put up for competitive bidding without approval from all security interest holders; and

(d) the lease offered to the winning bidder will be for a term of 15 years. The department may provide to the winning bidder a lease with a term longer than 15 years only as provided for under (8).

(9) The department may issue a lease for a term greater than 15 years for loan security purposes as provided in ARM 36.25.1010(1). However, any lease issued at a lease rental rate under this rule shall be limited to a 15 year term. A lease issued for longer than 15 years may only specify the terms and conditions provided in ARM 36.25.1001 through ARM 36.25.1013, including the lease fee stipulated therein. A new lease whose term is longer than 15 years may be issued by the department during the term of an existing lease or at renewal. During the term of an existing lease, the department may issue a new lease to a lessee requiring a lease term greater than 15 years for loan security purposes.

(10) For the renewal of an existing lease that is competitively bid, including leases where the lessee initiates the competitive bid process under this rule, the lease rate established by competitive bidding will apply at the date of the renewal of the lease.

(11) For a new lease, the lease rate established by the winning competitive bid shall apply at the date the lease is issued.

(12) The results of the competitive bidding for all cabinsites will be posted on the department web site annually.

History: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

*This is an unofficial copy of the latest version of ARM 36.25.1016 through 36.25.1021 as adopted in MAR Notice 36-22-158 on January 12, 2012. These rules became effective on January 13, 2012, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

## **NEW RULE II (36.25.1017) ROLLING GEOGRAPHIC LOCATION AVERAGE LEASE RATE**

(1) By October 31 of each year, the department will establish a rolling geographic location average lease rate for each geographic location, to be used for the next billing cycle that begins January 1 of the following year. For the purposes of ARM 36.25.1016 through ARM 36.25.1021, two types of geographic locations shall exist in the land area administered by each unit office of the department within the northwest, southwest, and central areas of the department, and the land area administered by each area office within the northeast, southern, and eastern areas of the department:

(a) one geographic location for cabinsites which are adjacent to water such as lakes, rivers, and streams; and

(b) one geographic location for cabinsites which lack access to water such as lakes, rivers, and streams.

(2) A minimum of three winning bids are necessary to establish a rolling geographic location average lease rate. The rolling geographic location average lease rates will be determined as follows:

(a) the department will document the bid amounts for every successful cabinsite that is competitively bid;

(b) the rolling geographic location average lease rate for a given billing cycle will be calculated using the competitive bid amounts from cabinsites in that geographic location for the most recent three calendar years, or as of January 1, 2012, if three years have not yet elapsed from the effective date of these rules; and

(c) the winning bid amount for every cabinsite that is successfully bid will be divided by the most recent appraised value from the DOR for that cabinsite. The resulting rates will then be averaged together by geographic location to determine the geographic location rolling average lease rate for the next billing cycle.

History: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

*This is an unofficial copy of the latest version of ARM 36.25.110 as amended in MAR Notice 36-22-148 on November 28, 2011. These rules became effective on December 9, 2011, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

### **NEW RULE III (36.25.1018) LEASE FEE FOR BID CABINSITE LEASES UNDER ARM 36.25.1016**

(1) At the conclusion of the term of any cabinsite lease existing prior to May 12, 2011, the lessee of that cabinsite lease may either choose to place the cabinsite lease up for open competitive bidding under ARM 36.25.1016, or the lessee may choose to renew the lease with a standard rental rate as provided in ARM 36.25.1001 through 36.25.1013.

(2) Where the lessee of a lease existing prior to May 12, 2011, has a cabinsite competitively bid under ARM 36.25.1016, the annual lease fee for the first year will equal the bid amount.

(a) However, in subsequent years, the annual lease fee for that lease will equal the most recent appraised value of the cabinsite as determined by the DOR multiplied by the rolling geographic location average lease rate effective for that year, plus an annual adjustment equal to the previous year's lease fee multiplied by the annual percentage change in the consumer price index (CPI) as provided in ARM 36.25.1001(9).

(3) The lessee of any currently leased cabinsite will have the ability, prior to renewal of the existing lease in effect as of the date of the adoption of ARM 36.25.1016 through 36.25.1021, to participate in the bidding method by applying on a form prescribed by the department. Once the current lease is renewed, or once a new 15-year lease is issued as part of the bidding process, a lessee will no longer have the option to switch to the bidding method during the term of a lease.

(a) Such an application will include an application fee and the requirement to be within deadlines prescribed by the department.

(b) The application must be accompanied by a supplemental lease agreement, which will describe the terms of the competitive bid process including the change in the lease fee which will be effective in the year following the lessee's application for competitive bidding.

(c) This one-time initial participation in the bidding method will require the lease fee to be calculated according to the applicable geographic location rolling average lease rate, or a rate of three percent if no geographic location rolling average lease rate has been established.

(i) A lease fee may be calculated using the geographic location rolling average lease rate in the lease year after the geographic location rolling average lease rate is established.

(d) Where the lessee of a lease existing prior to May 12, 2011, has a cabinsite competitively bid under ARM 36.25.1016, the annual lease fee for the first year will equal the bid amount.

(i) However, in subsequent years, the annual lease fee for that lease will equal the most recent appraised value of the cabinsite as determined by the DOR, multiplied by the rolling geographic location average lease rate effective for that year, plus an annual adjustment equal to the previous year's lease fee multiplied by the annual percentage change in the consumer price index (CPI) as provided in ARM 36.25.1001(9).

(4) Any lease that is put out for bid will be bid at a minimum bid of 2% of the entire, most recent appraised value without phase-in.

History: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

*This is an unofficial copy of the latest version of ARM 36.25.1016 through 36.25.1021 as adopted in MAR Notice 36-22-158 on January 12, 2012. These rules became effective on January 13, 2012, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

#### **NEW RULE IV (36.25.1019) SUBLEASING AND ABANDONMENT OF IMPROVEMENTS**

(1) This rule applies to all cabinsites.

(2) Lessees may sublease their improvements if they are in compliance with the terms and conditions of their lease agreement, provided that the lessees must notify the department of their intent to sublease their improvements prior to subleasing.

(3) Where permanent improvements are placed upon a cabinsite lease after the effective date of these rules and the cabinsite lease is canceled, terminated, or abandoned for a period of three years, the title to all such improvements will automatically vest in the department without representation or warranty.

(a) If the department receives value for the improvements through a sale, the department will transfer the proceeds to the previous lessee, at the last address of record.

(b) If the previous lessee cannot be reached at the last address of record, the department will deposit the proceeds into the permanent trust account.

(4) When selling improvements left upon the cabinsite lease for more than three years:

(a) the department may conclude the sale, disposal, or removal of the improvements in any expedient manner, or it may direct the removal or demolition of the improvements;

(b) the department may keep a portion of the value received for improvements to compensate the department for necessary costs incurred, such as, but not limited to:

(i) marketing of the improvements;

(ii) demolition;

(iii) disposal fees;

(iv) repairs; and

(v) maintenance; and

(c) any moveable personal property remaining on the cabinsite three years after the date a cabinsite lease is cancelled, terminated, abandoned, or otherwise ends shall become the property of the department to keep, sell, or dispose of at the department's discretion without compensation or reimbursement to the previous lessee.

**History:** 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

This is an unofficial copy of the latest version of ARM 36.25.110 as amended in MAR Notice 36-22-148 on November 28, 2011. These rules became effective on December 9, 2011, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.

**DISCLAIMER:** If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.

## **NEW RULE V (36.25.1020) SALE OF CABINSITE LANDS**

(1) This rule applies to all cabinsites.

(2) Cabinsites may be sold as provided in Article X of the Montana Constitution and 77-1-204, 77-2-301, and 77-2-318, MCA.

(a) The sale of cabinsites under the land banking program will be conducted using the procedures set out in ARM 36.25.801 through 36.25.817.

(b) The board may in its sole discretion designate that the proceeds from the sale of certain cabinsites be deposited within the permanent fund for the affected trust beneficiary.

(3) The board or the department may nominate a cabinsite for sale at any time.

(4) A cabinsite lessee may nominate the sale of the lease premises:

(a) during the fifteenth year of any 15-year cabinsite lease that was established through the open competitive bidding process;

(b) through the transition process provided for in 77-1-236, MCA; or

(c) pursuant to 77-2-318(4), MCA, or any other time.

(5) The sale of cabinsites shall be conducted in a manner consistent with the procedures set out in 77-2-363(2) through (5), MCA. The minimum bid must be equal to the full market value of the premises, which must be determined by a Montana-licensed and Montana-certified appraiser. The department may determine the timing and the number of cabinsite lots to be offered for sale, and the conditions of the sale, based upon, but not limited to, the following factors:

(a) how many lots are currently available for competitive bidding;

(b) current real estate market conditions;

(c) the time available to market a cabinsite before the bid closing date and season/time of year;

(d) the administration of other cabinsites; and

(e) valuing, selling, repairing, or removing existing improvements on cabinsites.

(6) Should no qualified bid be received by the department, or if the board determines that it is not in the best interest of the affected trust beneficiary to accept any bid, the sale shall be rejected, and the existing cabinsite lease may be renewed to the former lessee at the previous lease terms.

History: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

*This is an unofficial copy of the latest version of ARM 36.25.1016 through 36.25.1021 as adopted in MAR Notice 36-22-158 on January 12, 2012. These rules became effective on January 13, 2012, and this copy will remain on the DNRC website until the official Secretary of State's administrative rules website is updated.*

**DISCLAIMER:** *If there is any discrepancy between the administrative rules contained within this document and the official Administrative Rules of Montana as maintained by the Secretary of State's Office, the official, legal version is that which is maintained by the Secretary of State's Office.*

**NEW RULE VI (36.25.1021) APPLICABILITY OF CABINSITE RULES**

(1) ARM 36.25.1001 through 36.25.1013 shall apply to all cabinsites, however cabinsite leases issued under ARM 36.25.1016 shall not be subject to ARM 36.25.1003, 36.25.1009(8), and 36.25.1012.

History: 77-1-204, 77-1-208, 77-1-209, 77-1-235, 77-1-236, MCA; IMP, 77-1-235, 77-1-236, MCA; NEW 2011 MAR p. 82, Eff. 1/13/12.

UNOFFICIAL VERSION