

NO. A11-2162

State of Minnesota
In Court of Appeals

Meriwether Minnesota Land & Timber LLC, et al.,
Respondents,
vs.

State of Minnesota;
Myron Frans, Commissioner, Minnesota Department of Revenue,
Appellants.

RESPONDENTS' BRIEF

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LEGAL ISSUES

1. Whether the Sustainable Forest Incentive Act (“SFIA”) granted Plaintiffs/Respondents a contract or promissory estoppel right to a 2010 incentive payment using a per-acre amount calculated using the formula set in the SFIA?

The District Court held that Plaintiffs had a promissory estoppel right to a 2010 SFIA payment not subject to the \$100,000 cap imposed by the State.

Apposite Authority: Minn. Stat. § 290C.01-.13 (2010); *Christensen v. Minneapolis Municipal Employee Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983); *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185 (Minn. 1958); *Sylvestre v. State*, 298 Minn. 142, 214 N.W.2d 658 (Minn. 1973).

2. Whether the State unconstitutionally impaired Plaintiffs’ contract or promissory estoppel rights by imposing a \$100,000 cap on 2010 SFIA payments?

The District Court held that application of the \$100,000 cap to Plaintiffs’ 2010 SFIA payments unconstitutionally impaired their promissory estoppel right to such payments.

Apposite Authority: U.S. Const. art. I, § 10; Minn. Const. art. 1, § 11; *Christensen, supra*; *Naftalin, supra*; *Sylvestre, supra*; *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 54 S.Ct. 840 (1977).

3. Whether the legislation placing a cap on the 2010 SFIA payments constituted an unconstitutional taking, where Plaintiffs elected to participate in the program, gave up rights of ownership, allowed public access and could not withdraw from the program without substantial penalties?

The District Court held that application of the \$100,000 cap to Plaintiffs’ 2010 SFIA payments was an unconstitutional taking.

Apposite Authority: U.S. Const. amend. V; Minn. Const. art. 1, § 13; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Interstate Co. v. City of Bloomington*, 790 N.W.2d 409 (Minn. Ct. App. 2010); *Theide v. Town of Sandia Valley*, 14 N.W.2d 400 (Minn. 1944); Minn. Stat. § 117.025, subd. 2 (2010); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

4. Whether the State violated the Equal Protection Clauses of the Minnesota and United States Constitutions by capping 2010 Sustainable Forest Incentive Act payments at \$100,000, thereby creating a distinction that was not rationally based between Plaintiffs and similarly situated forest land owners?

The District Court declined to address Plaintiffs’ equal protection claim.

Apposite Authority: *Murphy v. Commissioner of Human Services*, 765 N.W.2d 100 (Minn. Ct. App. 1999); *State v. Johnson*, 777 N.W.2d 767 (Minn. Ct. App. 2010); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991); Minn. Stat. § 290C01.

5. Whether the district court erred by denying summary judgment in favor of the State?

The District Court refused to grant summary judgment in Appellants' favor.

Apposite Authority: Minn. R. Civ. P. 56; *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66 (Minn. 2000); *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985).

6. Whether the District Court erred in denying the State the opportunity to conduct discovery before granting partial summary judgment to Respondents?

The District Court held that discovery was unlikely to produce genuine issues of material fact and that the undisputed facts before the Court warranted entry of summary judgment in favor of Respondents.

Apposite Authority: Minn. R. Civ. P. 56.06.

7. Whether the State of Minnesota is a proper party to this action?

The District Court concluded the State was a proper party defendant.

Apposite Authority: *Hoyt Props v. Production Resource*, 716 N.W.2d 366 (Minn. Ct. App. 2006); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977); *Minnesota Educ. Ass'n v. State of Minnesota*, 282 N.W.2d 915 (Minn. 1979); *Sylvestre, supra*; *Anderson v. State*, 435 N.W.2d 74 (Minn. Ct. App. 1989).

8. Whether the District Court erred in imposing a \$10.38 per-acre rate for 2010 SFIA incentive payment to Plaintiffs, to the extent that the per-acre amount awarded to Plaintiffs differs from the statutory formula and was significantly lower than the Sustainable Forest Incentive Act per-acre rate for payments made to other program participants?

The District Court declined to reach Plaintiffs' equal protection argument and ordered the State to pay Respondents using a per-acre rate of \$10.38, not the \$15.67 rate produced by the statutory formula which was paid to smaller landowners not subject to the \$100,000 cap.

Apposite Authority: *Murphy, supra*; *State v. Johnson, supra*; *Russell, supra*; Minn. Stat. § 290C.01.

STATEMENT OF THE CASE

The Sustainable Forest Incentive Act (Minnesota Statutes Chapter 290C, referred to as the “SFIA” or the “Act”) was passed in 2001 to “encourage the State’s private forest landowners to make a long-term commitment to sustainable forest management.” Minn. Stat. § 290C.01 (2011). Under the Act, the State agreed to pay eligible owners of Minnesota forest land annual per-acre incentive payments in exchange for the claimants’ compliance with statutory requirements. These requirements included submitting an application; adhering to a forest management plan for all parcels of land enrolled under the SFIA program; (for large landowners) allowing year-round public access to enrolled lands; and recording at least eight-year restrictive covenants (by which participating landowners committed to compliance with all aspects of the SFIA) for all enrolled parcels. The statute requires a four-year withdrawal notice and imposes significant and onerous penalties for early withdrawal.

This action is brought by three large forest landowners whose vested right to 2010 SFIA payments were drastically cut in 2010. The case arises from the actions of the State of Minnesota and its public officials in passing an amendment to Minn. Stat. § 290C.07 in 2010. That amendment denied Plaintiffs the full benefits they had earned under the Act, but failed to relieve Plaintiffs of the burdens imposed by SFIA participation. *See* Laws 2010, First Special Session chapter 1, article 13, section 4.

Plaintiffs Meriwether, Blandin and Potlatch filed this action challenging the State’s imposition of a \$100,000 cap on SFIA payments, reducing Plaintiffs’ collective expected payments for 2010 from almost \$7.7 million to \$300,000. Plaintiffs contend

that the State's actions, on their face and as implemented by the Commissioner of Revenue, constitute a breach of contract or, alternatively, a promise which the State is estopped from dishonoring; unconstitutional impairment of contract under both the Minnesota and United States Constitutions; and violation of the Takings clauses and the Equal Protection clauses of the United States and Minnesota Constitutions.

Plaintiffs moved for partial summary judgment as to the payments due to them in October 2010 for lands enrolled in the SFIA program for calendar year 2009 under their claims for: breach of contract (Count I), promissory estoppel (Count II), unconstitutional impairment of contract (Count III), denial of equal protection under the law (Count IV), and unconstitutional taking of property without just compensation (Count V). The State simultaneously moved to dismiss Plaintiffs' complaint.

On November 3, 2011, the Ramsey County District Court, the Honorable John B. Van de North, filed its Findings of Fact, Conclusions of Law and Order for Judgment denying, in large part, the State's motion to dismiss¹ and granting Plaintiffs' motion for partial summary judgment. The District Court held that the 2010 legislative amendments to the SFIA unconstitutionally impaired Plaintiffs' quasi-contract rights to 2010 SFIA incentive payments for land enrolled in 2009. The District Court also determined that Plaintiffs demonstrated entitlement to the SFIA payments under the Takings clause of the Minnesota and United States Constitutions.

¹ The District Court dismissed Governor Dayton, the Minnesota House of Representatives, and the Minnesota Senate with prejudice. The District Court dismissed the Commissioner of Minnesota Management and Budget without prejudice.

The District Court declined to address Plaintiffs' claim under the Equal Protection clauses of the Minnesota and United States Constitutions. The District Court examined historical payment increases under the SFIA and, rather than ordering the State to pay Plaintiffs the full, statutory 2010 SFIA formula rate of \$15.67 per acre (the rate paid to smaller landowners who were not affected by the \$100,000 cap), the Court calculated the average annual percentage increase in SFIA per-acre rates from the beginning of the program, applied that average percentage increase to the per-acre rate paid in 2009, and ordered that the State pay Plaintiffs \$10.38 per acre for the 2010 payments due, plus interest as required by Minn. Stat. § 290C.08, subd. 1.²

Judgment was entered pursuant to the District Court's November 3, 2010, Order on November 9, 2010.

STATEMENT OF FACTS

Plaintiffs Meriwether Minnesota Land & Timber LLC ("Meriwether"), Blandin Paper Company ("Blandin") and Potlatch Corporation (including Potlatch Forest Holdings, Inc., Potlatch Land & Lumber, LLC, Potlatch Minnesota Timberlands, LLC and Potlatch Lake States Timberlands, LLC, all collectively referred to as "Potlatch") own significant acreages of forest land in northern Minnesota. Together, Plaintiffs

² On November 9, 2011, the District Court issued an order granting Respondents' motion to supplement and amend their complaint to include facts and requests for relief relating to the 2011 special legislative amendments to the SFIA. The 2011 special legislation made permanent the \$100,000 SFIA payment cap, among other objectionable provisions. Plaintiffs' claims in the Supplemented and Amended Complaint relating to the 2011 amendments are still before the District Court.

enrolled more than 500,000 acres of forest land in northern Minnesota in the SFIA program, making them the largest participants in that program. Appellants' Supplemental Record ("SR") 34, ¶ 13; SR 58, ¶ 12; SR 11, ¶ 12.

The SFIA expressly states its purpose:

It is the policy of this state to promote sustainable forest resource management on the state's public and private lands. Recognizing that private forests comprise approximately one-half of the state forest land resources, that healthy and robust forest land provides significant benefits to the state of Minnesota, and that ad valorem property taxes represent a significant annual cost that can discourage long-term forest management investments, this chapter, hereafter referred to as the "Sustainable Forest Incentive Act," is enacted to encourage the state's private forest landowners to make a long-term commitment to sustainable forest management.

Minn. Stat. § 290C.01 (2011).

The SFIA's statutory purpose advances the public policy expressed in the Minnesota Constitution, which commits the State to promoting healthy and robust forest lands. Article 10 of the Minnesota Constitution, Section 2, provides for the enactment of tax laws that "encourage and promote forestation and reforestation of lands whether owned by private persons or the public. . . ." *See also* Minn. Const. art 11, § 5(f) (allowing public debt for and improvements to promote forestation).

The legislature amended the SFIA after its original enactment in 2001, but the essential provisions of the Act were not changed to the detriment of Plaintiffs until 2010, when incentive payments were capped at \$100,000 per claimant.

The Sustainable Forest Incentive Program

Under SFIA, the State promised to pay qualified owners of Minnesota forest land annual incentive payments in exchange for the claimants' enrollment in the program and their agreement to specific terms as to the use of enrolled lands. *See generally* Minn. Stat. Ch. 290C. The eligibility requirements for landowners to participate in the program are set out in Minn. Stat. § 290C.03 and include:

- Enrolled land must consist of at least 20 contiguous acres and at least 50 percent of the land must meet the statutory definition of forest land during the enrollment period;
- A forest management plan must be prepared by an approved plan writer and implemented during the enrollment period;
- There can be no delinquent property taxes on the land;
- Timber harvesting and forest management guidelines must be used in conjunction with any timber harvesting or forest management activities conducted on enrolled land; and
- Claimants enrolling more than 1,920 acres in the program must allow the public "year-round, nonmotorized access to fish and wildlife resources on enrolled land," with some very limited exceptions.

Minn. Stat. § 290C.03(a)(1), (2), (3), (5) and (6) (2010).

In order to be eligible for SFIA incentive payments, land must be enrolled in the program for a minimum of eight years. *See* Minn. Stat. § 290C.03 (a)(4) (2010). There is a four-year waiting period for voluntary withdrawal from the program, and the statute ensures a minimum eight-year enrollment by prohibiting a claimant from beginning the withdrawal process until its land has been enrolled for a minimum of four years. *See* Minn. Stat. § 290C.10 (2010). The Act contains substantial penalties for non-compliance or early withdrawal: a landowner who ceases compliance or withdraws lands before

minimum time set by the act must reimburse the State for the past four years of payments, plus interest. Minn. Stat. § 290C.10, 290C.11.³

For Plaintiffs, that translates to the following penalties (exclusive of interest) that would have been assessed had they stopped their participation in the program in 2010: \$5,633,115.62 for Meriwether; \$5,497,440.10 for Blandin; and \$1,322,939.03 for Potlatch. *See* Respondents' Supplemental Record ("RSR") 56, 98, 143, 154, 167, 183 (showing the acreages enrolled by each Plaintiff, the per-acre price for the year, and payments made to each Plaintiff in 2010 and prior years); *see also* Appellants' Addendum ("Add.") 9.

Enrollment in the Sustainable Forest Incentive program begins with an application submitted to the Commissioner of Revenue ("Commissioner") by September 30 for land to become eligible the following year. Minn. Stat. § 290C.04(a) (2010); *see also* RSR 9-12. The application form must include, among other things, "proof, in a form specified by the commissioner, that the claimant has executed and acknowledged in the manner required by law for a deed, and recorded, a covenant that the land is not and shall not be developed in a manner inconsistent with the requirements and conditions of this chapter." Minn. Stat. § 290C.04(a) (2010).

³ A claimant has 90 days to satisfy the penalty payment for removal of land from the SFIA program. Minn. Stat. § 290C.11 (2010). If the penalty is not paid within the 90-day period, the Commissioner "shall certify the amount to the county auditor for collection as a part of the general ad valorem real property taxes on the land in the following taxes payable year." *Id.*

The covenant required by the Act for enrollment in the incentive program “shall state in writing that the covenant is binding on the claimant and the claimant’s successor or assignee, and that *it runs with the land for a period of not less than eight years.*” Id. (emphasis added); *see also* RSR 13.

The Covenant includes provisions providing that:

- “Any person purchasing or acquiring an interest in the property during the time this covenant is in effect must also abide by the terms of the covenant.”
- “This covenant is not a contract; it is a condition of the SFIA. The conditions of the SFIA and of this covenant are requirements of current law that could change in the future.”
- “Under the SFIA law, this covenant shall run with the property for a period of at least eight years from the date listed above or for the period that the property is in the SFIA program, whichever is longer, unless the claimant qualifies for an earlier termination.”
- “These restrictions shall run with the property and bind me [the landowner], all other owners, our heirs, and any future owners as provided under the SFIA law. The restrictions are a condition for entrance into the SFIA Program and are required in order to receive an annual incentive check from the Department of Revenue.”

RSR 13-14. The Commissioner of Revenue authored the covenant form. *See* Minn. Stat. § 290C.04(a) (2011).

The restrictions of the covenant provide that the property may not be developed in violation of the provisions of the SFIA. This means that the property is not and will not be used for residential or agricultural purposes; may not be enrolled in the Reinvest in Minnesota (RIM) program or in a state or federal conservation reserve or easement reserve program; may not be enrolled in the Minnesota Agricultural Property Tax Law (also known as Green Acres); may not be subject to certain specified agricultural land

preservation controls or restrictions, or be improved with a structure, pavement, sewer, permanent campsite, or any road (other than a township road), that are used for purposes not prescribed in the forest management plan; and may not be classified as 2c Managed Forest Land. Minn. Stat. § 290C.02, Subd. 6 (2011).

In exchange for agreeing to the requirements and restrictions of the program, claimants under the Sustainable Forest Investment program are eligible to receive an annual per-acre incentive payment. Minn. Stat. § 290C.07 (2011). Under the Act, the per-acre payments “shall equal the greater of” three formulas and “*will be made* annually to each claimant in the amount determined” by formula, and “*shall be paid* on or before October 1 each year” Minn. Stat. § 290C.07 (2011) and 290C.08 (2011) (emphasis added). Interest at the annual rate set in Minn. Stat. § 270C.40 “shall be included with any incentive payment not paid by the later of October 1 of the year the certification was due” *Id.*

Minnesota Statutes Chapter 290C contains no language disclaiming the creation of contract rights and no reservation to the legislature of the ability to reduce the incentive payments owed to claimants with enrolled lands. The SFIA also does not exclude from participation landowners who participate in voluntary forest certification programs.

Plaintiffs each enrolled lands in the SFIA program and have at all times complied with the requirements of the SFIA. *See* SR 32-34, ¶¶ 5–11; SR 56-57, ¶¶ 4–10; SR 9-10, ¶¶ 4-10; *see also* RSR 56, 98, 143, 154, 167, 183 (documenting incentive payments made to Plaintiffs, by which the State acknowledged Plaintiffs’ compliance with program requirements).

Blandin first enrolled land for 2002 and was one of the first claimants to receive a Sustainable Forest Incentive payment in October 2003 for its 182,549 enrolled acres. SR 56, ¶¶ 2-4. Meriwether and Potlatch first enrolled lands in 2005, with 248,512 acres and 27,302 acres respectively. SR 32, ¶ 3; SR 9, ¶ 2. All three Plaintiffs have remained in the program continuously since their first enrollment. SR 32, ¶¶ 4, 5; SR 56, ¶¶ 3, 4; SR 9, ¶¶ 3, 4; *see also* Exhibit A to Affidavits of Scott Jones, Joseph Maher and Michael Houser filed on or about April 20, 2011 (maps showing each of the Plaintiffs' SFIA enrolled lands).

Meriwether, Blandin, and Potlatch met all the requirements of the SFIA program in 2009 to make them eligible to receive payments on a per-acre basis on October 1, 2010.

The undisputed record establishes that the Sustainable Forest Incentive program has been an important factor for Meriwether, Blandin, and Potlatch in deciding to invest in and hold large areas of Minnesota forest land, and all three entities have relied on SFIA payments in managing their enrolled lands. SR 32, ¶¶ 3, 5; SR 56, ¶¶ 2, 4; SR 9, ¶¶ 2, 4.

Financial Incentives for Enrolling

The total annual payment made to a landowner was intended to be based on the number of acres enrolled, regardless of where the enrolled forest land is in Minnesota. *See* RSR 186-187. From the Act's inception, the Department of Revenue calculated the annual incentive payment three different ways, and the method that produced the highest per acre payment was the one used for that year. *See id.*; *see also* Minn. Stat. § 290C.07.

The methods for calculating incentive payments under the Sustainable Forest Incentive Act remained in place for many years and were revised in 2008 and again in 2009. The per acre payment amount increased in each year of the program's existence, including after the formulas were changed in 2008 and 2009. *See* RSR 18. Although the Act was amended several times, until 2010 no amendment to the Act lessened the state's obligation as to incentive payments. *Id.*

Significantly, the Act specifies that “[t]he amount necessary to make the payments under this section *is annually appropriated* to the commissioner from the general fund.” Minn. Stat. § 290C.08, subd. 2 (2010) (emphasis added).

Plaintiffs' Participation in Voluntary, Private Forest Management Programs

The Sustainable Forestry Initiative (“SFI”) and the Forest Stewardship Council (“FSC”) offer voluntary forest management certification. *See* Affidavit of Andrew Arends (“Arends Aff.”), filed May 9, 2011, ¶ 2. However, the SFI and FSC certification programs have significantly different requirements than the Minnesota Sustainable Forest Incentive Act. *See generally* SR 90-226.

The SFI voluntary certification standards call for program participants to “support and promote recreational opportunities for the public,” but unlike the SFIA, the SFI private certification program does not require a public easement on Plaintiffs' lands. *Compare* SR 98 (SFI Performance Measure 5.4 states that “Program Participants shall support and promote recreational opportunities for the public, where consistent with forest management objectives”) to Minn. Stat. § 290C.03 (a)(6) (noting that “claimants enrolling more than 1,920 acres in the sustainable forest incentive program *must allow*

year-round, nonmotorized access to fish and wildlife resources on enrolled land ...”) (emphasis added).

FSC certification also does not require public access to Plaintiffs’ land. Mr. Arends notes in his affidavit that the FSC standards consider “diversified uses of forest land that may include providing access to the public for hunting and fishing.” Arends Aff. ¶ 11. Importantly, however, the FSC Forest Management Standards that are attached to Mr. Arends’ affidavit do not include any public access requirements. *See* SR 114-116 (describing criteria associated with Principle 2, “Tenure and Use Rights and Responsibilities,” of the FSC Standards, and noting that “tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established” and nowhere requiring public access to FSC-certified lands).

Neither the SFI nor the FSC programs substantially impact a landowner’s ability to parcel, sell, or transfer its property, because unlike the SFIA, neither program requires that a restrictive covenant be recorded against or run with the certified lands. *See generally* SR 90-226. The SFI and FSC programs require no minimum acreage for enrollment. *See* SR 90-104, 14.

Most significantly, neither the SFI nor the FSC programs specify a minimum number of years for enrollment or contain penalties for withdrawing land from the program. *See generally* SR 90-226. Notably, these programs are also not legally enforceable and can be set aside if a landowner is presented with a better economic opportunity, such as selling the land for development. *Compare* Minn. Stat. § 290C.055 (requiring covenant running with the land for minimum of eight years).

2010 State Action to Cap Incentive Payments at \$100,000 per Claimant

The Minnesota Legislature amended Chapter 290C to place a \$100,000 cap on total annual payments to any one landowner for payments due on or before October 10, 2010. The Legislature, however, did not amend § 290C.07 to change the formula for calculating the per-acre incentive amount, nor did it amend § 290C.08, subd. 1, which entitles claimants to an incentive payment “for each acre of enrolled land . . . in the amount determined under Section 290C.07.” The Legislature also did not amend § 290C.08, subd. 2, which provides that “the amount necessary to make the payments under this section is annually appropriated to the commissioner from the general fund.” The Legislature did not amend the purpose and public policy that is the basis for the Act. *See* Minn. Stat. § 290C.01. Finally, and significantly, the 2010 Legislature did not amend the withdrawal procedures (requiring a four-year withdrawal period) to allow landowners affected by the cap to get out of the program and have their SFIA covenants released, nor did the Legislature amend the provision imposing enormous monetary penalties for early withdrawal. *See* Minn. Stat. § 290C.10, 290C.11 (2011).

Reduced 2010 Incentive Payments to Plaintiffs

Plaintiffs Meriwether, Blandin and Potlatch submitted timely certifications by August 15, 2010, for their 2009 enrolled lands. Jones Aff., ¶ 11, Ex. D; Maher Aff., ¶ 10, Ex. D; Houser Aff., ¶ 10, Ex. D. The per-acre price for Sustainable Forest Incentive payments due October 1, 2010, was determined to be \$15.67 using the statutory formulas as revised in 2009. RSR 18. The higher per-acre price for 2010 payments resulted from an amendment to the statutory formula that used, as one of its factors, values for class 2c

managed forest land, rather than class 2b timberland. *See* Minn. Stat. §§ 290C.06 and 290C.07 (2011); *see also* Jones Aff., Ex. E; Maher Aff., Ex. E; Houser Aff., Ex. E.

Instead of receiving payments based on the statutory per-acre price in return for their compliance with all program requirements for all enrolled lands in 2009, Plaintiffs each received flat, capped payments of \$100,000. *Id.*; *see also* RSR 19. Rather than the \$15.67 per-acre amount set and appropriated by statute, and using the figures reported by the State, Meriwether received 38¢ per acre, Blandin 54¢ per acre and Potlatch just over \$1.60 per acre. *See* RSR 135 (State's report of 2009 acreages and payment amounts for payments made in 2010).

Of the 1,700 total Sustainable Forest Incentive Act claimants for 2009, only six (including Plaintiffs) were affected by the \$100,000 incentive payment cap. *See* RSR 135. All other claimants received the full statutory formula amount of \$15.67 per acre for all enrolled parcels. RSR 99-135.

With a total state budget of approximately \$32 billion for fiscal year 2010-11,⁴ the approximately \$7.7 million the State saved by capping Plaintiffs' SFIA incentive payments constituted .024% of the total state budget, or less than one-quarter of one-tenth of one percent.

⁴ The District Court took judicial notice of this approximate figure. Add. 14. Documents available from the state show the Fiscal Year 2010-11 budget as being between \$31 and \$33 billion. *See* RSR 206 (showing in fourth column from right "Enacted FY10-11" state resources of \$31.162 billion); RSR 212 (showing, in addition to state resources, \$2.1 billion in federal funding).

ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews *de novo* the decision of the trial court on summary judgment. “No deference is given to a lower court on questions of law.” *Modrow v. IP Foodservice*, 656 N.W.2d 389, 393 (Minn. 2003).

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Scott v. Minneapolis Police Relief Ass’n*, 615 N.W.2d 66, 70 (Minn. 2000); *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn.1979). The burden is on the moving party to show the absence of any disputed material fact. *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985). Once the movant has supported the motion, however, the non-moving party must show a material fact issue remains in dispute by presenting specific admissible facts giving rise to a factual question. *Id.* at 215. Summary judgment is mandatory against a party who fails to establish an essential element of a claim or defense, if that party has the burden of proof, because this failure renders all other facts immaterial. *See Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001).

The facts material to the claims presently before the Court are not in dispute. Respondents respectfully request that the Court affirm the decision of the District Court, but that the Court order the payments due to Respondents to be calculated at the full statutory rate of \$15.67—the same rate paid to smaller landowners not affected by the \$100,000 cap.

B. THE STATE BREACHED ITS OBLIGATION TO RESPONDENT AS A MATTER OF CONTRACT OR PROMISSORY ESTOPPEL.

1. Undisputed documentation from the parties establishes that Plaintiffs properly enrolled in the SFIA program.

The State made full per-acre payments to Plaintiffs for years before 2010, pursuant to the statutory payment formula in the SFIA. *See, e.g.*, RSR 56, 143, 154, 167, 183. Plaintiffs' certifications filed in 2010 for 2009 enrolled lands were accepted by the Commissioner of Revenue, whose documents showing 2010 payments reflect the enrolled acres for all three Plaintiffs. *See* RSR 19. The State has not made any argument that Plaintiffs failed to hold up their end of the SFIA bargain.

2. The State may make enforceable contracts or promises for the payment of money.

Minnesota courts have long recognized the power of the State, through legislative action, to enter into binding contracts. In the seminal case of *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185 (Minn. 1958), the Minnesota Supreme Court held:

Although the legislature may not surrender, suspend, or contract away the state's power of taxation (Minn. Const. art. 9, § 1), there is nothing in the constitution which prohibits the legislature from irrevocably binding its taxing power to provide the funds necessary to fulfill the state's contractual obligations to pay money.

Id. at 389, 90 N.W.2d at 191 (citation omitted) (emphasis added).

Likewise, in *Sylvestre v. State*, 298 Minn. 142, 214 N.W.2d 658 (Minn. 1973), the Minnesota Supreme Court quoted the United States Supreme Court's decision in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443 (1938), affirming a state's ability, through its legislature, to enter into contracts:

The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. *Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10.* If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature.

Sylvestre, 298 Minn. at 150-151, 214 N.W.2d at 664 (quoting *Anderson*, 303 U.S. at 100, 58 S.Ct. at 446) (emphasis added).

The Minnesota Supreme Court has enforced the promises of the State, made through acts of the legislature, under both contract and promissory estoppel principles. In *Sylvestre*, the court held that the plaintiff judges accepted the State's offer of retirement benefits by meeting the requirements of the retirement benefit statute: "When these judges entered upon their judicial position, the state in effect said to them, 'If you will stay on the job for at least 15 years and then retire after having reached the specified retirement age, we will pay you a part of your salary for the remainder of your life.'" *Id.* at 152, 214 N.W.2d at 665. The Court held that a judge who gives up the right to engage in private practice "often for a much smaller financial reward," in anticipation of a statutory retirement benefit, had a right to enforce the state's promise to pay retirement benefits. *Id.* at 154, 214 N.W.2d at 666.

The *Sylvestre* court also rejected the argument that the State, through legislative action, could change the rules applicable to retirement of judicial officers after those

judges had performed as required by the statute. Quoting the Pennsylvania Supreme Court, the Minnesota Supreme Court held in *Sylvestre*: “Whether it be in the field of sports or in halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game.” *Id.* at 152-53, 214 N.W.2d at 665 (quoting *Hickey v. Pittsburgh Pension Board*, 378 Pa. 300, 310, 106 A.2d 233, 238 (1954)). The *Sylvestre* court held that the State’s promise of retirement benefits was enforceable. *Id.* at 154, 214 N.W.2d at 666.

Similarly, in *Christensen v. Minneapolis Municipal Employee Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983), the Supreme Court considered whether the State’s statutory promise to a municipal employee to pay retirement benefits was enforceable, even after an amendment to the statute made the employee unqualified to receive benefits. The Court cited its 1928 decision in *Gorczyca v. City of Minneapolis* for the contract approach to the question. Quoting *Gorczyca*, the Court held that “the statute becomes a part of the contract of employment and contemplates such pension or allowance as part of the compensation for the services rendered.” *Id.* at 747 (quoting *Gorczyca*, 174 Minn. 594, 598, 219 N.W. 924, 925 (1928)) (emphasis added).

The *Christensen* court ultimately turned to principles of promissory estoppel, rather than contract, in concluding that the State had made a binding promise. *Id.* at 748. Significantly to the present case, the Court noted that a problem with a strict contract analysis is that “in making an ‘offer’ the state may, at the same time, say that it is not creating any contract rights.” *Id.* Recognizing the unfairness of such an approach, the Court held:

[I]t should be noted that the statutory disclaimers of pension contract rights do more than simply reserve the state's right to amend or modify its contractual promise from time to time; instead, the disclaimers purport to deny the creation of any contract right at any time. If this is true, *then the state's promise is illusory*; it is dependent once again on the 'graciousness and appreciation of sovereignty' (or the lack of it) = an archaic notion of a gratuity, which we have rejected.

Id. (emphasis added).

Significantly, Chapter 290C contains no language disclaiming the creation of contract rights or an enforceable promise of the State, and there is no reservation by the Legislature in the statute of the ability to reduce incentive payments to claimants enrolled in the program. *See Lynch v. U.S.*, 292 U.S. 571, 577-78, 54 S.Ct. 840, 842-43 (1934) (noting that frequent changes to benefit statute that "voluntarily enlarged" the government's obligation did not "disturb vested rights" and therefore did not give rise to complaint, and further noting as significant that Congress did not reserve the "power to curtail the amount of benefits Congress contracted to pay").

The *Christensen* court applied this well-established definition of promissory estoppel: "A promise which the promisor should reasonably expect to induce action or forbearance on the part on the promisee ... and which does induce such action or forbearance is binding if injustice can be avoided duly by enforcement of the promise." *Id.* at 679 (quoting Restatement (Second) of Contracts § 90 (1981)). Promissory estoppel may be applied against the State to the extent that justice requires. *Id.* (citing *Mesaba Aviation Division v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) and

Construction Supply Co. v. Bostrom Sheet Metal Works, 291 Minn. 113, 120, 190 N.W.2d 71, 75 (1971)).

Analyzing a state's legislative promise under the principle of promissory estoppel, the *Christensen* court held that it must look at two factors: 1) What has been promised by the State? and 2) To what degree and to what aspects of the promise has there been reasonable reliance on the part of the person to whom the promise was made? *Id.* at 749. The court held that in *Christensen*, what was promised and what was relied upon was a pension program, "the terms of which are protectable subject to *reasonable legislative modification* from time to time." *Id.* (emphasis added); *see also* discussion of *Lynch*, *supra* at 18 (holding that a state's voluntary enlargement of rights at one time do not disturb vested rights, and noting significance of lack of reservation of right to decrease benefits).

3. The State made an enforceable promise to Plaintiffs.

The principles articulated in *Naftalin*, *Sylvestre* and *Christensen* all apply to this case. The State made an enforceable promise to pay claimants enrolled in the SFIA program in 2009 the statutory formula payments by October 1, 2010. Plaintiffs complied with the requirements of the SFIA program and were enrolled, with their enrolled lands certified. For that compliance, the State promised incentive payments. It was only in 2010, after all of Meriwether, Blandin and Potlatch's 2009 compliance, that the State altered the statute. After the cap was put in place, Plaintiffs could not withdraw without significant penalty. The cap deprived Plaintiffs of the benefits they relied on in entering and staying in the program. In short, the State attempted to "change the ground rules in

the middle of the game” as the *Sylvestre* court described (298 Minn. at 152-53, 214 N.W.2d at 655), drastically reducing the per-acre price paid to the Plaintiffs for their enrolled lands.

The State makes the argument that Plaintiffs’ claims are defeated by the Department of Revenue-approved covenant form stating that the covenant itself is not a contract. This argument fails:

First, the *Christensen* court expressly rejected this premise in adopting a promissory estoppel approach toward legislative promises. Noting that statutory language disclaiming the creation of a contract under such circumstances makes the State’s promise illusory, the Court held in *Christensen* that even with such *statutory* language, the State may be estopped from denying its promise when a party relies on that promise and satisfies all conditions for enforcement of the promise. 331 N.W.2d at 748.

More importantly, the statute itself, Minn. Stat. Ch. 290C, contains no language disclaiming the creation of a contract. It is only the Department of Revenue-issued form covenant that contains such language. Certainly, if language adopted by the Legislature attempting to disclaim contract rights improperly makes the state’s promise illusory, then language in a document created by a state agency that is, apparently, wholly the creation of the person who drafted the covenant, cannot defeat the promise made by the Legislature in the SFIA.

Finally, the statute and other documents provided to and completed by claimants in the SFIA program are rife with language of promise. The statute repeatedly uses mandatory language to describe the incentive payments to be made if the requirements of

the Act are satisfied. *See, e.g.*, Minn. Stat. §§ 290C.02, subd. 3 (defining as a “claimant” one who owns forest land and files an application to enroll in the program, as well as anyone bound by an SFIA covenant); 290C.04(c) (stating that the Commissioner “shall” release land from a covenant required under the chapter within 90 days after denial of an application); 290C.07 (stating that the payment to an approved claimant “Shall equal the greater of” the product of statutory formulas); 290C.08, subd. 1 (stating that an “incentive payment for each acre of enrolled land *will be made annually in the amount determined under section 290C.07*” and that the incentive payment “*shall be paid on or before October 1 each year,*” and also providing that “interest at the annual rate determined under section 270C.40 *shall be included* with any incentive payment not paid by the later of October 1 of the year the certification was due, or 45 days after the completed certification was returned or filed. . . .”) (emphasis added).

Even the covenant document concedes that the covenant itself is a “requirement” of current law and acknowledges that “if the property otherwise becomes no longer subject to the restrictions of the SFIA program, then the Commissioner of Revenue *shall issue* a document releasing the claimant and the property from the terms and restrictions of this covenant.” RSR 14 (emphasis added). The covenant further states that the restrictions contained in that covenant “*are a condition* for entrance into the SFIA program and *are required* in order to receive an annual incentive check from the Department of Revenue.” *Id.* (emphasis added). See also RSR 12 (Form TH1 Instructions for the SFIA Enrollment Application, emphasizing that SFIA conditions are

“requirements” for receiving payments and stating payments may be “expected” upon fulfillment of requirements).

As in *Sylvestre*, the State here in effect said to Meriwether, Blandin and Potlatch, “If you satisfy the requirements of this Act, we will pay you the statutory formula amount by October 1 of each year for your compliance with the Act with respect to land in the program the prior year.” See *Sylvestre*, 298 Minn. at 152, 214 N.W.2d at 665. Plaintiffs accepted the offer made by the statute and an enforceable obligation was created.

4. Plaintiffs relied on the State’s promise.

Plaintiffs’ rights to incentive payments in 2010 vested by the time the Legislature enacted the \$100,000 cap. The State’s enforcement of the cap after Plaintiffs’ completed performance amounted to a retroactive application of the law. A law applied retroactively “takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or consideration already past.” *Cooper v. Watson*, 290 Minn. 362, 369, 187 N.W.2d 689, 693 (1971); see also 72 Am. Jur.2d, Statutes § 244; *Landgraf v. USI Film Products*, 511 U.S.244, 269-70 (1994) (the inquiry into whether a statute has retroactive effect is whether the new provision “attaches new legal consequences to events completed before its enactment”); *Opinion of the Justices (Furlough)*, 135 N.H. 625, 630, 609 A.2d 1204, 1207 (N.H. 1992) (defining “retrospective law” as “every statute which takes away or impairs vested rights, acquired under existing laws”) (citations omitted).

As set out in detail in the Affidavits of Scott Jones of Meriwether, Joseph Maher of Blandin and Michael Houser of Potlatch, each of the claimant Plaintiffs relied on the

State's promise of benefits. Each Plaintiff complied with the requirements of the Sustainable Forest Incentive Act for the express reason that, by doing so, it would receive the statutory incentive payment under the Act. Plaintiffs relied on the State's promise because they recorded covenants meeting the requirements of the Act and managed their enrolled lands consistent with the Act. Moreover, Plaintiffs bound themselves for a minimum of eight years (with a four-year withdrawal period), received incentive payments under the Act for years and reasonably believed that those payments would continue, per the formulae set in the statute, as long as they complied with the conditions for payment and did not withdraw from the program. Were it not for the incentive payments provided under the Act, Plaintiffs would not have recorded restrictive covenants against their lands. Plaintiffs have offered unchallenged testimony that the availability of SFIA incentive payments was a significant factor in their decision to invest in forest lands and that they relied on SFIA payments in exchange for restrictions on their use of their lands. SR 9-10, ¶¶ 5-9; SR 32-33, ¶¶ 3, 6-10; SR 56-57, ¶¶ 2, 5-9.

The State blatantly – and apparently deliberately – ignores one of the most significant aspects of Plaintiffs' reliance, namely the enormous penalties that would have been imposed on Plaintiffs if they had chosen to withdraw their lands from the program when the State unilaterally decided to cap SFIA incentive payments and reduce the per-acre price paid to Plaintiffs by as much as 98%. Judge Van de North concluded, and the State does not dispute in its submissions to this Court, that:

The Act also imposes significant penalties for early withdrawal of land from the program. *See* Minn. Stat. § 290C.11 (2010). An SFIA claimant who discontinues its

compliance with the terms of the Act prior to the end of the eight-year covenant or before the mandatory four-year withdrawal period is subject to penalty in the form of four years' worth of incentive payments, plus interest. Minn. Stat. § 290C.11. For Plaintiffs, that translates to the following penalties (exclusive of interest) that would have been assessed had they stopped their participation in the program in 2010: \$5,633,115.62 for Meriwether; \$5,497,440.10 for Blandin; and \$1,322,939.03 for Potlatch.

Add. 9. Having already performed all requirements of the SFIA, Plaintiffs were also deprived of the ability to remove their lands from SFIA and restore their full ownership rights. To do so, Plaintiffs would have been forced to pay millions of dollars back to the State for their undisputed performance in prior years.

The State offered no response to this argument in the District Court, and tries to avoid the issue in its brief to this Court, because there is no adequate response. To accept the State's argument is to accept that the State may negotiate concessions from landowners that significantly alter their ownership rights in exchange for payments from the State; bind landowners to those restrictions for an eight-year period; impose astronomical penalties on those landowners if they try to restore their full ownership rights; but then refuse to pay those landowners as promised when the deal was originally struck. Such a result is contrary to the well-established law and should be rejected.

Likewise, the State's argument that Plaintiffs' participation in private sustainable forest programs defeats their reliance, is also fundamentally flawed. Again, the State ignores the substantial penalties associated with SFIA participation, as well as Judge Van de North's conclusion regarding those penalties as related to Plaintiffs' voluntary participation in sustainable forestry programs. The District Court held:

Plaintiffs participate in private sector voluntary forest management programs that also have financial benefits and use restrictions. However, the eight-year participation requirement and the substantial penalty for early removal of land from the SFIA program *are unique to the Act*.

* * *

Neither the SFI nor the FSC programs impact the Plaintiffs' ability to parcel, sell, or transfer their property in the same fashion as the SFIA, because, *unlike the SFIA, neither program requires a restrictive covenant to be recorded and to run with Plaintiffs' lands*. The SFI and FSC programs require no minimum acreage for enrollment, although they do encourage owners to qualify all holdings for certification. Neither the SFI nor the FSC programs specify a minimum number of years for enrollment or contain financial penalties for withdrawing land from the program. *In addition, these voluntary, private forest management certification programs do not provide for property tax relief incentive payments like the SFIA*.

The Court finds that Plaintiffs are not following the requirements of the SFIA merely to satisfy the SFI or FSC certification programs; rather, *Plaintiffs' continuing commitments to eight-year participation, management requirements and public access were given to obtain the property tax relief only available under the SFIA and to avoid costly early withdrawal penalties*.

* * *

[D]espite adequate time...to do so, Defendants have not produced facts suggesting that participation in the private forest management programs produces economic benefits to Plaintiffs comparable to the property tax relief available under the SFIA.

Add. 9, 12-13, 19 (emphasis added).

Moreover, the State makes no argument, nor can it, that the SFIA prohibits participants in that program from also participating in (and deriving some benefit from)

private programs that also promote sustainable forestry. The statute contains a number of eligibility exclusions, which demonstrate that the Legislature knew how to and intended to exclude participation on various grounds. *See, e.g.*, Minn. Stat. § 290C.02, subd. 6 (defining forest land to exclude land used for non-forest purposes or enrolled in other conservation programs). The purpose statement of the Act also confirms the State’s public policy that “ad valorem property taxes represent a significant annual cost that can discourage long-term forest management investments...” Minn. Stat. §290C.01 (2011) (which policy language remains in the statute, unaltered, since its enactment in 2001). That policy statement contains no exception for lands that are part of voluntary certification programs.

If the State genuinely believed that landowners would invest in forest lands in Minnesota and engage in sustainable forestry on those lands simply to satisfy voluntary, private program requirements, it would have excluded from participation in SFIA any lands enrolled in such private, voluntary programs and amended the policy statement of the Act to indicate that such voluntary programs removed barriers to forest investment and sustainable management (and so SFIA payments were unnecessary). The Attorney General’s argument, conceived after this lawsuit was commenced, that Plaintiffs’ participation in private forestry certification programs somehow bars Plaintiffs’ recovery, must be recognized for what it is: a red herring that bears no relationship to the realities of the statute or Plaintiffs’ participation in the SFIA program.

5. *The State's promise to Plaintiffs must be enforced to prevent injustice.*

A significant injustice to Plaintiffs will result if the State is allowed to breach its promise. As the *Sylvestre* court held, “it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game.” 298 Minn. at 152-53, 214 N.W.2d at 665; *See also Christensen*, 331 N.W.2d at 749.

Allowing the State to substantially diminish – and effectively eliminate – the promised benefit for enrollment in the Sustainable Forest Incentive program *after* Plaintiffs had satisfied all conditions of the program in 2009, is at least as fundamentally unfair as the situations in *Sylvestre* and *Christensen*, where the plaintiffs faced no forfeiture of prior payments. Plaintiffs already performed their obligations by observing the restrictions and requirements of the SFIA covenants and forest management plans, in reliance on the payment formulae set in the statute at the time of Plaintiffs’ performance. The State’s decision to reduce the payments promised to Plaintiffs for performance that was already complete (and from which Plaintiffs could not reasonably withdraw for four years) is not only contrary to basic principles of contract law and promissory estoppel, it is also fundamentally unfair. The State breached an enforceable promise, and the District Court properly held that Plaintiffs were entitled to 2010 payments.

C. THE STATE UNCONSTITUTIONALLY IMPAIRED RESPONDENTS’ QUASI-CONTRACT RIGHTS BY IMPOSING A CAP ON 2010 SFIA PAYMENTS.

The State’s decision to cap payments to Plaintiffs, effectively reducing the per-acre price paid to Plaintiffs by between 90 and 98% as compared to the statutory per-acre price promised, is unconstitutional. Article I, Section 10 of the United States

Constitution prohibits the states from passing any “law impairing the obligation of contracts” Similarly, Article 1, Section 11 of the Minnesota Constitution states that “No . . . law impairing the obligation of contracts shall be passed”

Minnesota courts have adopted the three-part test of *Energy Reserves Group v. Kansas Power & Light*, 103 S.Ct. 697 (1983) for determining whether a contractual impairment is unconstitutional and not justified by a public interest:

- a. The initial question is whether the law has, in fact, operated as a substantial impairment of a contractual obligation. “The severity of the impairment increases the level of scrutiny to which the legislation is subjected.” *Christensen*, 331 N.W.2d at 750-51 (citing *Energy Reserves*).
- b. The state must then demonstrate “a significant and legitimate public purpose behind the legislation.” *Id.*
- c. The state’s action is then examined in light of the stated public purpose “whether the adjustment of the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” *Id.* (quoting *Energy Reserves*, 103 S.Ct. at 705-06).

Significantly, this three-part test “is applied with more scrutiny when the state seeks to impair a contract to which it is a party than when it regulates a private contract since ‘complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.’” *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519 (1977)).

The Minnesota Supreme Court’s holding in *Naftalin* applies directly here:

[T]he state, under the contract clauses of the state and the Federal constitutions, cannot impair that contract but is bound to carry out its terms *without repealing, postponing,*

diminishing, or otherwise impairing the tax levies so established for its fulfillment...

It is generally recognized that statutory provisions *existing at the time of the issuance by the state of bonds or other undertakings to pay money*, which control or regulate their manner and source of payment, constitute – in the absence of a stipulation to the contrary – a part of the state’s contractual obligation.

252 Minn. at 389-90, 90 N.W.2d at 389–90 (emphasis added).

1. The State substantially impaired Plaintiffs’ vested rights.

In *Sylvestre*, the Court held that “taking away the right to receive compensation ... without any compensating benefits constitutes an impairment of the contract.” 298 Minn. at 154-55, 214 N.W.2d at 666. Importantly, in that case, the Court held that a reduction in the benefit offered to retiring judges – imposed after the judges had completed their performance and served in office for the required period of time – was an unconstitutional impairment of contract. *Id.* at 155, 214 N.W.2d at 666.

Likewise in *Christensen*, the Court held that a promise that is enforceable under the principle of promissory estoppel is subject to the law of unconstitutional impairment of contract. 331 N.W.2d at 749-50 (citing Restatement (Second) of Contracts § 90, comment d (1981) and holding “promises rendered binding through estoppel are entitled to the normal enforcement remedies of general contract law”).

There is no question that Plaintiffs’ rights were substantially impaired by the State’s actions here. The State promised Plaintiffs payments under a formula whose product was \$15.67 per acre for 2009 enrolled lands. Instead, the State paid Plaintiffs

between 38¢ and \$1.60 per acre. On its face, this action constituted a substantial impairment of Plaintiffs' rights.

2. ***The State cannot satisfy its burden of establishing a public interest sufficient to justify this impairment, or that the means chosen to further that alleged public interest were narrowly tailored.***

The State has the burden of proving that its substantial impairment of Plaintiffs' contractual rights was a valid exercise of the state's inherent police power:

[I]f a State undertakes to alter substantially the terms of a contract, it must justify the alteration, and the burden that is on the state varies directly with the substantiality of the alteration. A serious alteration of the terms of a contract resulting from state legislation is permissible if, but only if, the legislation is necessary to meet a broad and pressing social or economic need, if the legislation is reasonably adopted for the solution of the problem involved, and if it is not over broad or over harsh.

Christensen, 331 N.W.2d at 750 (citing *White Motor Corp. v. Malone*, 599 F.2d 283, 287 (8th Cir 1979)).

The *Christensen* court rejected the State's police power argument in the context of the impairment of a contractual right to retirement benefits, holding that "[t]here is no claim that the integrity of the pension fund or of the overall state budget is so affected that the obligation to Christensen and those similarly situated cannot reasonably be kept." *Id.* The Court noted as well that the interest asserted by the State in that case "may be served sufficiently by less drastic alternatives," which also diminished the reasonableness of the State's alleged exercise of police power.

The SFIA contains an express annual appropriation of "the amount necessary to make the payments under this section . . . from the general fund." Minn. Stat. § 290C.08,

subd. 2.⁵ Unless the State can satisfy its burden of proving such a significant impact on the State's general fund that the State's promise to Plaintiffs "cannot reasonably be kept," the State's impairment of Plaintiffs' contractual rights is unconstitutional. The State cannot make such a showing here.

Defendants' obligation to Plaintiffs under the SFIA is a financial arrangement that is not entitled to any special deference simply because the State is a party to it. *See U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29, 97 S.Ct. 1505, 1521 (1977) ("[A] state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors"); *Lynch v. United States*, 292 U.S. 571, 580, 54 S. Ct. 840, 844 (1934) (holding that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States"); *Continental Illinois Nat'l Bank v. State of Washington*, 696 F.2d 692, 699, 700 (9th Cir. 1983) (holding that the state may not "alter [its] ability to perform," having entered into "binding contracts with third parties who have relied on the existence" of the power of the state to enter into such contracts).

⁵ This provision distinguishes the present case from *BHGDN, LLC v. State of Minnesota*, 598 F. Supp.2d 995 (D. Minn. 2009). In that case, the Court rejected the plaintiff's contract impairment claim because there, the contract at issue was between the plaintiff and a private party and was contingent on an appropriation of funds by the Legislature. *See id.* at 1003. Here, the Legislature made an annual appropriation of funds for payment of the statutory formula amount in the Act itself, and that provision was never repealed. *See Minn. Stat. § 290C.08, subd. 2.*

Merely asserting the police power as the basis for state action “is not sufficient to shield it from scrutiny when constitutional considerations are at stake.” *Carlstrom v. State of Washington*, 694 P.2d 1, 11 (Wash. 1985).

As a matter of law, the State cannot establish a threat to the state budget that justified the substantial impairment of Plaintiffs’ rights here. *See Christensen*, 331 N.W.2d at 750 (rejecting the State’s police power argument and holding that “[t]here is no claim that the integrity of the pension fund or of the overall state budget is so affected that the obligation to Christensen and those similarly situated cannot reasonably be kept”). As in *Christensen*, the interests asserted by the State “may be served sufficiently by less drastic alternatives,” and there is no evidence here that the State considered any such alternatives in determining to cap 2010 SFIA payments. *See also U.S. Trust*, 431 U.S. at 30-31, 97 S.Ct. at 1521-22 (holding that an impairment must be “both reasonable and necessary” to justify exercise of the police power and that “a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well”); *Continental Illinois Nat’l Bank and Trust v. State of Washington*, 696 F.2d 692, (9th Cir. 1983) (citing *U.S. Trust* and holding that “[I]mposition of public spending is also certainly a legitimate state goal, but its weight is diminished in contract clause analysis when the state limits its own previous financial commitments,” and concluding that “merely saving money” is an insufficient basis for invocation of the police power).

The only justification offered by the State for the 2010 special legislation that capped SFIA payments is that the State was experiencing financial difficulty and that the

Legislature chose to mitigate the financial pressure on the state by cutting some SFIA payments. This reason is insufficient to justify the use of the police power here.

“Although economic concerns can give rise to [a public entity’s] legitimate use of the police power, such concerns must be related to ‘unprecedented emergencies,’ such as mass foreclosures caused by the Great Depression.” *American Federation of State, County and Municipal Employees, Local 2957 v. City of Benton, Arkansas*, 513 F.3d 874, 882 (8th Cir. 2008) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, 98 S.Ct. 2716 (1978); cf. *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444-447, 54 S.Ct. 231 (1934) (describing emergency circumstances that justified use of police power to place moratorium on mortgage foreclosures during the Depression). As the United States Supreme Court held in *Lynch*, decided during the Great Depression:

No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditures, would not be the practice of economy, but an act of repudiation. “The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.”

Lynch v. United States, 292 U.S. 571, 580, 54 S.Ct. 840, 844 (1934) (quoting *Sinking-Fund Cases*, 99 U.S. 700, 719 (1879)).

With a total state budget of approximately \$32 billion for the fiscal year, the approximately \$7.7 million the state did not pay by capping Plaintiffs' SFIA incentive payments constituted .024% of the total state budget, or less than one-quarter of one-tenth of one percent. The savings resulting from the cap, in the context of the overall state budget, was *de minimis*, and Judge Van De North properly held the State did not meet its burden in proving police power justification for the cap. *See* Add. 14.

3. The State's "windfall" argument fails.

The State argues that the District Court exceeded its equitable powers because a ruling in Plaintiffs' favor results in a windfall to Plaintiffs. This argument is contrary to established constitutional law.

In *Christensen*, the State argued that the plaintiff's benefits were disproportionate to his service and his contributions disproportionate to his benefits. But Mr. Christensen had been told that when he accumulated ten years in municipal service he would have earned a pension. At the time he left city service on January 2, 1974, Mr. Christensen had accumulated 16 years of service for pension purposes. *See* RSR 192 (showing Mr. Christensen's service to the City of Minneapolis). Having rendered his service by age 38, he started receiving a pension as provided by state statute. *Id.* The Minnesota Supreme Court ruled the State did not have the freedom to kick him off its pension rolls, reduce his pension, or treat him differently than other pensioners, despite the fact that his contributions – both financial and in terms of time of service – appeared disproportionately low compared to his benefit. 331 N.W.2d at 751. In marked contrast

to the Plaintiffs in this case, Mr. Christensen faced threat of having to pay back benefits already paid.

In short, the Minnesota Supreme Court has rejected the notion that a perceived windfall – perceived only *after* a plaintiff has performed its end of the bargain – defeats that plaintiff’s right to vested benefits. *See id.* at 751-52 (holding that while “correcting an inequity or a fiscal misjudgment can be a significant public purpose,” such a “correction” will not justify impairment of vested rights, particularly when “the integrity . . . of the overall state budget” is not significantly affected).

D. THE 2010 SFIA PAYMENT CAP WAS AN UNCONSTITUTIONAL TAKING.

The 2010 special SFIA legislation imposing a cap on incentive payments is also unconstitutional under the Takings Clause. Article 1, section 13 of the Minnesota Constitution states: “Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” The Fifth Amendment to the United States Constitution, applicable to states through the Fourteenth Amendment, also prohibits the taking of property by the government without just compensation. *See* U.S. Const. amend. V (stating “nor shall private property be taken for public use, without just compensation”); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122–38 (1978).

The more restrictive language of the Minnesota Constitution provides greater protection to property owners than the Takings clause in the United States Constitution. *See Interstate Co. v. City of Bloomington*, 790 N.W.2d 409, 411 (Minn. Ct. App. 2010). Minnesota courts review the issue of whether a governmental action has resulted in a

taking as a question of law. *Id.* at 413; *see also Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

Property ownership includes “the right to acquire, possess, and enjoy property.” *Theide v. Town of Sandia Valley*, 14 N.W.2d 400, 405 (Minn. 1944). The United States Supreme Court recognized that a takings claim results when the State deprives an owner of property of the right to exclude others. *See Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994). A taking also includes “every interference, under the power of eminent domain, with the possession, enjoyment, or value of private property.” *See* Minn. Stat. § 117.025, subd. 2 (2010). These constitutional and statutory provisions have been construed to mean that “the clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions.” *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003); *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992).

This authority, among others, defeats the State’s contention that there has been no diminution in the value of Plaintiffs’ ownership rights. Among other things, Plaintiffs gave up their right to exclude the public from their property in exchange for the expectation of statutory incentive payments. The right to exclude others from real property is a fundamental right and “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *See Kaiser Aetna v. United States*, 444 U.S. 164, 176–81 (1979).

In addition to requiring public access, the State required Plaintiffs to significantly restrict the ways in which they may use their land under the SFIA program. In exchange

for SFIA incentive payments, the State restricted Plaintiffs from developing their land in violation of the provisions of the SFIA, which means that Plaintiffs may not use their property for residential purposes or agricultural purposes. *See* Minn. § Stat. 290C.02, subd. 6. Plaintiffs may not improve their land with structures, pavements, sewers, permanent campsites, or any roads (other than a township road), that are used for purposes not prescribed in the forest management plan for the property. *Id.*

Plaintiffs lost their ability to be nimble with their land, giving up economic flexibility for the surety of vital state payments. The District Court correctly held that this amounted to an unconstitutional taking. *See Dale Props., LLC v. State*, 638 N.W.2d 763, 765 (Minn. 2002).

E. THE DISTRICT COURT PROPERLY DECLINED TO GRANT SUMMARY JUDGMENT TO THE STATE.

- 1. For the reasons set forth above, the District Court properly concluded that Plaintiffs were entitled to summary judgment.**

The District Court rightly concluded that the State's action in capping 2010 SFIA payments was an unconstitutional impairment of quasi-contract rights held by Plaintiffs and that it also represented an unconstitutional taking. *See supra*. For the same reasons that summary judgment was warranted on those claims, the District Court properly denied summary judgment to the State.

- 2. The State was not entitled to discovery under Minn. R. Civ. P. 56.06.**

Judge Van de North also correctly rejected the State's belated argument – conceived only after this lawsuit was filed – that Plaintiffs' participation in private sustainable forest certification programs somehow barred reliance on SFIA payments,

and further concluded that additional discovery was not likely to produce facts relevant to the issues before the Court. Add. 19. The voluntary certification arguments of the State are merely a distraction from the State's abandoned promise to Plaintiffs.

The State has also failed to meet the requirements of Minn. R. Civ. P. 56. That rule allows for additional discovery, before entry of summary judgment, only where it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition..." The only affidavit that even comes close to a Rule 56.06 affidavit is that of Kevin Finnerty, Assistant Attorney General. *See* SR 237-240. Nowhere in Mr. Finnerty's affidavit does the State articulate reasons why discovery would be necessary to present "facts essential" to justify the State's opposition to Plaintiffs' motion for summary judgment. Instead, Mr. Finnerty merely states that "Defendants would want to pursue in discovery" various issues. SR 239, ¶ 10. None of those issues listed is dispositive; indeed, many are entirely irrelevant to the questions before the Court. Accordingly, the State's request for reversal to complete discovery should be denied.

3. The State of Minnesota is a proper party defendant in this action.

The State is not only a proper party, but an indispensable party, and the District Court properly retained it as a party to this action. An indispensable party is a party "without whom the action could not proceed in equity and good conscience." *Hoyt Props. v. Production Resource*, 716 N.W.2d 366 (Minn. Ct. App. 2006) (quoting *Murray v. Harvey Hansen-Lake Nokomis, Inc.*, 360 N.W.2d 658, 661 (Minn. Ct. App. 1985)). A party is indispensable when a court cannot render an adequate judgment without the

absent party and relief cannot be crafted without prejudicing the absent party's rights. *See Hoyt*, 716 N.W.2d at 377 (citing Minn. R. Civ. P. 19.02; *Murray*, 360 N.W.2d at 661).

The State is an essential party along with the Commissioner of Revenue, because Plaintiffs are not merely challenging the application of the statute by the Commissioner; rather, Plaintiffs are challenging the State's legislative amendment, which resulted in the breach of the State's agreement with Plaintiffs. Many of the cases cited by both parties in this action involve a state generally as a defendant, including the State of Minnesota in cases in which plaintiffs seek relief for the State's breach of or unconstitutional impairment of contract. *See, e.g., U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977); *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840 (1934); *Minnesota Educ. Ass'n v. State of Minnesota*, 282 N.W.2d 915 (Minn. 1979); *Sylvestre v. State*, 298 Minn. 142, 214 N.W.2d 658 (Minn. 1973); *Anderson v. State*, 435 N.W.2d 74 (Minn. Ct. App. 1989); *Rhode Island Council 94, AFSCME, AFL-CIO v. State of Rhode Island*, 705 F.Supp.2d 165 (D.R.I. 2010); *see also Christensen*, 331 N.W.2d 740 (Minn. 1983) (State included as third-party defendant).

The Seventh Circuit *Quinones* case cited by Defendants is distinguishable because it involved an employment agreement for pension contributions between a firefighter and the City of Evanston. *See Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995). The State of Illinois' involvement in the *Quinones* case was vastly different than the State's involvement in this case, and the court in *Quinones* held that the State need not be a party because the dispute was between Quinones as employee on one hand, and

the City of Evanston which had engaged in an alleged violation of the Age Discrimination in Employment Act, on the other. Here, the breached promise at issue is between the State and Plaintiffs. The State is the party whose acts hurt Plaintiffs.

Plainly, the Commissioner of Revenue was not the only party that did harm to Plaintiffs here, and the Commissioner was not a party to the quasi-contractual arrangement Judge Van de North concluded existed between the State of Minnesota and Plaintiffs. As in the cases cited above, the State should remain as a party and the district court was correct in denying the State's motion to dismiss.

F. PLAINTIFFS' CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSES OF THE MINNESOTA AND U.S. CONSTITUTIONS IS WELL-SUPPORTED; THE STATE SHOULD HAVE BEEN ORDERED TO PAY PLAINTIFFS \$15.67 PER ACRE FOR THE 2010 PAYMENTS.

The Equal Protection clauses of the U.S. Constitution and the Minnesota Constitution require the State of Minnesota, whether acting through its Legislative, Executive or Judicial Branches, to treat similarly situated individuals alike. The Fourteenth Amendment to the U.S. Constitution states "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Article 1, sec. 2 of the Minnesota Constitution provides that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

"Equal protection is an inherent but unenumerated right found and confirmed in Minnesota's state constitution." *Murphy v. Commissioner of Human Services*, 765 N.W.2d 100, 106 (Minn. Ct. App. 2009) (citing *Howes v. 1997 Jeep Wrangler*, 602

N.W.2d 874, 880 (Minn. Ct. App. 1999)). The Equal Protection Clause requires the State to treat similarly situated individuals alike. *State v. Johnson*, 777 N.W.2d 767, 772 (Minn. Ct. App. 2010); *see also Doll v. Barnell*, 693 N.W.2d 455, 462 (Minn. Ct. App. 2005), *rev. denied* (Minn. June 14, 2005). Similarly situated groups must be alike “in all relevant respects.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *St. Cloud Police Relief Ass’n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. Ct. App. 1996). It is impermissible for the State to create “manifestly arbitrary or fanciful” distinctions between similarly situated groups where there is no “genuine and substantial” difference to justify “providing a natural and reasonable basis” for legislation “adapted to peculiar conditions and needs.” *See Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 729 (Minn. 2008).

In determining whether Plaintiffs’ equal protection rights have been violated, the Court must determine “whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.” *Gluba by Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007).

When considering an equal-protection claim under the Minnesota Constitution, courts must not “hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.” *Murphy v. Comm’r of Human Servs.*, 765 N.W.2d 100, 106 (Minn. Ct. App. 2009) (quoting *Gluba*, 735 N.W.2d at 721). Rather, in Minnesota, courts “have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” *State v.*

Russell, 477 N.W.2d 886, 889 (Minn. 1991). The Minnesota rational basis test applies a “higher standard.” See *Kahn v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005); *Mitchell v. Steffen*, 504 N.W.2d 198, 210 (Minn. 1993) (Tomljanovich, J., dissenting) (comparing Minnesota’s approach to rational basis review to “mid-level” scrutiny). Specifically, the Minnesota rational basis test requires that:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) *the classification must be genuine or relevant to the purpose of the law*; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Gluba, 735 N.W.2d at 721 (emphasis added).

The purpose of the Sustainable Forest Incentive Act is to preserve Minnesota’s forest land by encouraging large land owners to engage in sustainable forestry practices. See Minn. Stat. § 290C.01 (2010) (noting that “[i]t is the policy of this state to promote sustainable forest resource management on the state’s public and private lands”).

Like the other claimants under the SFIA who have subjected themselves to the restrictions of the Act in exchange for the State’s promise to make incentive payments, Plaintiffs are similarly situated to all of the other SFIA claimants. Similar to all other enrolled landowners, Plaintiffs are required to: (1) meet the eligibility requirements set forth in Minn. Stat. § 290C.03; (2) prepare forest management plans, as defined by Minn. Stat. § 290C.02, Subd. 7; (3) apply to enroll forest land pursuant to Minn. Stat.

§ 290C.04; (4) submit annual certifications described in Minn. Stat. § 290C.05; (5) abide by the restrictive covenant for a minimum of eight years, as required by Minn. Stat. § 290C.055; (6) and submit to the withdrawal procedures of Minn. Stat. § 290C.10 and the penalties for removal in Minn. Stat. § 290C.11. In addition, as large landowners, Plaintiffs had to grant public access.

Capping the incentive for the largest landowners unfairly characterizes them and is not reasonably related to the purpose of the SFIA. Rather, the legislature's discriminatory cap on incentive payments to the largest landowners contradicts the purpose of the statute because it eliminates the incentive to maintain large forest areas. *Cf. United States Dep't of Ag. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that the legislative classification in food stamp program could not be sustained because it was irrelevant to the stated purpose of the act); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (noting that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

As described above, the federal courts including the Minnesota and U.S. Supreme Courts have ruled that the powers of a state legislature, while broad, are not unlimited. *See, e.g., Bond v. Floyd*, 385 U.S. 116, 135, 87 S.Ct. 339, 349 (1966) (barring a state legislature from refusing to seat a member who exercised his free speech rights); *see also generally Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185, (Minn. 1958); *Sylvestre v.*

State, 298 Minn. 142, 214 N.W.2d 658, (Minn. 1973); *Christensen v. Minneapolis Municipal Employee Retirement Bd*, 331 N.W.2d 740 (Minn 1983).

For the Plaintiffs in this case, the landscape is even more compelling than in other cases cited here. In return for their statutorily defined performance, they were promised annual payments calculated on a per-acre basis. Instead of receiving the \$15.67 per acre other smaller landowner participants received, the Plaintiffs received from 38¢ per acre (for Meriwether) to \$1.60 per acre for Potlatch. Blandin's rate was 54¢ per acre.

The District Court, acknowledging that the \$15.67 product of the statutory formula was an unexpectedly high per-acre rate, sought some middle ground for the State and chose a rate of \$10.38 per acre. But the appropriate remedy was \$15.67 per acre. \$15.67 gives the Plaintiffs the benefit of their bargain and treats them like other participants.

Just as it was determined that Mr. Christensen was entitled to his full pension according to standard calculations, so the Plaintiffs are entitled to their full 2010 payments. Those payments should be calculated according to the state-chosen formula, in accordance with the original statutory mandate that the incentive payment was to be paid, "for each acre of enrolled land..." 290C.09, subd. 1. For the State to say otherwise is to create a manifestly arbitrary and fanciful distinction contrary to the ruling of *Greene v. Commissioner of Human Services*, 755 N.W.2d 713, 729 (Minn. 2008) and other cases.

The \$100,000 cap underscores the special legislation character of the 2010 amendments which deny the Plaintiffs equal protection of the laws. The State wanted forest land enrolled, as evidenced by the per-acre incentive. The Legislature knew that the tradeoff for larger enrollment was larger payments. The \$100,000 cap is antithetical

to the rest of the statute. It was not rational, reasonable or equitable to treat forest landowners enrolling more than 6,381 acres⁶ to a lower per acre incentive rate than smaller land owners. It isn't rational because it defeats the purpose of the statute, a section that notably remains unchanged in the recent legislative machinations.

In its 49-line attempt to rebut the argument that Plaintiffs have been denied equal protection, the State cites an inapposite case on long term disability, *Kolton v. County of Anoka*, 645 N.W.2d 403 (Minn 2002). In *Kolton*, the parties had no commercial relationship. *Kolton* cites a tax rates case and tort claims damage cap cases from other jurisdictions, which are not applicable to the present situation. The State apparently acknowledges that its business relationship with Plaintiffs is different than the cases it cites, so it argues the different classifications of capped and uncapped participants is rational simply because the Legislature imposed the SFIA cap completely ignoring the articulated statutory goals of preserving forests through forest management in exchange for per-acre ad valorem tax relief.

Just as the *Christensen* court acknowledged that Mr. Christensen was entitled to have the State's promise enforced and at the promised rate, so too are the Plaintiffs here entitled to have the State's promise enforced and at the same per-acre rate as all other participants.

⁶ This acreage, paid at \$15.67 per acre results in a \$100,000 SFIA payment.

CONCLUSION

The State breached an enforceable obligation to Plaintiffs when it capped SFIA payments at \$100,000 for 2010. The State's action was unconstitutional on multiple grounds, and the District Court properly granted partial summary judgment to Plaintiffs and awarded 2010 payments to them. Under Equal Protection principles, Plaintiffs are entitled to the same \$15.67 per acre paid to all other SFIA enrollees. Plaintiffs respectfully request that this Court affirm the District Court's entry of partial summary judgment to Plaintiffs, but that the rate to be used in calculating 2010 payments owed to Plaintiffs be \$15.67 per acre.

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Dated: January 17, 2012.



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State of Minnesota
In Court of Appeals

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vs.

State of Minnesota; Myron Frans, Commissioner, Minnesota Department of Revenue,
Appellants.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a 13-point, Times New Roman font. The length of this brief is 1,136 lines and 13,352 words. This brief was prepared using Microsoft Word 2007.

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