

NO. A11-2162

State of Minnesota
In Court of Appeals

Meriwether Minnesota Land & Timber LLC, et al.,
Respondents/Cross-Appellants,
vs.

State of Minnesota;
Myron Frans, Commissioner, Minnesota Department of Revenue,
Appellants/Cross-Respondents.

RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF

Lori Swanson
Attorney General, State of Minnesota

Alan I. Gilbert (#0034678)
Kevin Finnerty (#0325995)
Jason Pleggenkuhle (#0391772)
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 757-1450

Attorneys for Appellants/Cross-Respondents

Sarah E. Crippen (#223074)
Timothy A. Sullivan (#107165)
Elizabeth C. Borer (#389943)
BEST & FLANAGAN LLP
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402-4690
(612) 339-7121

Attorneys for Respondents/Cross-Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

ARGUMENT..... 1

I. EQUAL PROTECTION OF THE LAWS REQUIRES THAT PLAINTIFFS BE TREATED THE SAME AS OTHER SIMILARLY SITUATED SFIA PARTICIPANTS; THE STATE SHOULD PAY PLAINTIFFS \$15.67 PER ACRE FOR 2010...... 1

A. PLAINTIFFS ARE SIMILARLY SITUATED TO OTHER SFIA PARTICIPANTS...... 2

 1. Plaintiffs are similarly situated because they must meet the statutory definition of an SFIA claimant. 3

 2. Like other SFIA participants, Plaintiffs faced significant penalties for removing land from the program. 3

 3. There is no significant distinction between Plaintiffs’ SFIA-enrolled lands and other SFIA-enrolled lands. 8

B. A CLASSIFICATION, SUCH AS THE 2010 INCENTIVE CAP, THAT DISCRIMINATES AGAINST LARGE FOREST OWNERS DOES NOT FURTHER THE PURPOSE OF THE SUSTAINABLE FOREST INCENTIVE ACT, AND IS THUS WITHOUT RATIONAL BASIS...... 9

 1. The arbitrary cap classification is not relevant to the purpose of the law. 10

 2. The State’s belatedly articulated rational basis is without merit. 13

C. UNDER EQUAL PROTECTION PRINCIPLES, PLAINTIFFS ARE ENTITLED THE FULL \$15.67 PER-ACRE RATE PAID TO OTHER SFIA PARTICIPANTS FOR 2010...... 16

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

<i>Gluba by Gluba v. Bitzan & Ohren Masonry</i> , 735 N.W.2d 713, 721 (Minn. 2007).....	9, 10, 13
<i>Greene v. Comm’r of Minn. Dep’t of Human Servs.</i> , 755 N.W.2d 713, 729 (Minn. 2008).....	8
<i>James v. Strange</i> , 407 U.S. 128 (1972).....	13
<i>Jimenez v. Weinberger</i> , 417 U.S. 628 (1974)	13
<i>Kahn v. Griffin</i> , 701 N.W.2d 815, 831 (Minn. 2005)	9
<i>Lienhard v. State of Minnesota</i> , 431 N.W.2d 861 (Minn. 1988)	12
<i>Louisville Gas & Electric Co. v. Coleman</i> , 277 U.S. 32, 37 (1928).....	8
<i>Mathews v. Lucas</i> , 427 U.S. 495, 510 (1976)	13
<i>Mitchell v. Steffen</i> , 504 N.W.2d 198, 210 (Minn. 1993).....	9
<i>Paquin v. Mack</i> , 788 N.W.2d 899, 906 (Minn. 2010).....	2
<i>State v. Cox</i> , 798 N.W.2d 517, 521 (Minn. 2011).....	2
<i>State v. Mitchell</i> , 577 N.W.2d 481, 492 (Minn. 1998).....	2
<i>State v. Russell</i> , 477 N.W.2d 886, 889 (Minn. 1991)	10
<i>U.S. Dep’t of Agric. v. Moreno</i> , 413 U.S. 528 (1973).....	13
<i>U.S. R.R. Ret. Bd. v. Fritz</i> , 449 U.S. 166, 184 (1980).....	13, 14, 16

Statutes

Minn. Stat. § 290C.01 (2010).....	passim
Minn. Stat. § 290C.02, subd. 3 (2010).....	3, 11, 15, 17
Minn. Stat. § 290C.03	15
Minn. Stat. § 290C.06	1
Minn. Stat. § 290C.07	1, 15
Minn. Stat. § 290C.08	1
Minn. Stat. § 290C.10	4
Minn. Stat. § 290C.11 (2010).....	4, 7
Minn. Stat. § 290C.13, subd. 7.....	7
Minn. Stat. § 88.01, subd. 16	11

INTRODUCTION

Plaintiffs are entitled to equal treatment under the Minnesota Sustainable Forest Incentive Act (“SFIA”). Blandin, Potlatch, and Meriwether had already performed their obligations under the Sustainable Forest Incentive Act when they were denied their statutorily-promised benefit payments in 2010. The State treated Plaintiffs differently than other landowners who received per-acre incentive payments set by the statutory formulae at \$15.67 per acre for participating in the SFIA program. The Legislature articulated no rational basis for this distinction in the 2010 legislation at issue here; the Attorney General’s after-the-fact justifications, articulated for the first time in this litigation, are insufficient to sustain the distinction made between Plaintiffs and other SFIA participants.

ARGUMENT

I. EQUAL PROTECTION OF THE LAWS REQUIRES THAT PLAINTIFFS BE TREATED THE SAME AS OTHER SIMILARLY SITUATED SFIA PARTICIPANTS; THE STATE SHOULD PAY PLAINTIFFS \$15.67 PER ACRE FOR 2010.

The State does not dispute that Plaintiffs Blandin, Potlatch, and Meriwether met all requirements of the SFIA program to entitle them to payments in 2010. The Sustainable Forest Incentive Act is based on “per acre” incentive payments. See Minn. Stat. § 290C.06 (directing the commissioner to calculate the average per-acre value of forest land); Minn. Stat. § 290C.07 (calculation of incentive payment as per-acre price); Minn. Stat. § 290C.08 (“An incentive payment for each acre of enrolled land will be made annual to each claimant . . .”) (emphasis added). Unlike smaller landowners,

Plaintiffs did not receive full statutory per-acre incentive payments in 2010. The \$100,000 payment cap in 2010 effectively treated Plaintiffs differently than all other SFIA participants because the State paid Plaintiffs only a fraction of the statutorily-calculated \$15.67 per acre that it paid to other SFIA participants. *See Paquin v. Mack*, 788 N.W.2d 899, 906 (Minn. 2010); *see also State v. Mitchell*, 577 N.W.2d 481, 492 (Minn. 1998) (stating that “[t]he Equal Protection Clause requires that the state treat all similarly situated persons alike”). There is no rational basis for treating Plaintiffs differently from other SFIA enrollees and the discriminatory treatment of Plaintiffs undercuts the purpose of the Sustainable Forest Incentive Act. Equal Protection principles also dictate that Plaintiffs should receive \$15.67 per SFIA acre, not the \$10.38 ordered by the District Court.

A. Plaintiffs are similarly situated to other SFIA participants.

Minnesota courts follow federal law to determine if groups are similarly situated. *See State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (noting that Minnesota courts have not always followed federal law in interpreting the state Equal Protection Clause, but they do rely on federal law to evaluate if two groups are similarly situated). The focus on determining whether groups are similarly situated is “whether they are alike in all relevant respects.” *Id.* at 522.

1. Plaintiffs are similarly situated because they must meet the statutory definition of an SFIA claimant.

As claimants under the SFIA, Blandin, Potlatch, and Meriwether are similarly situated to the other claimants that enrolled land in the Sustainable Forest Incentive Act program. By statute, a “claimant” is:

- (a) a person . . . who owns forest land in Minnesota and files an application authorized by the Sustainable Forest Incentive Act;
- (b) a purchaser or grantee if property enrolled in the program was sold or transferred after the original application was filed and prior to the annual incentive payment being made; or
- (c) an owner of land previously covered by an auxiliary forest contract that automatically qualifies for inclusion in the Sustainable Forest Incentive Act program pursuant to section 88.49, subdivision 9a, or 88.491, subdivision 2.

Minn. Stat. § 290C.02, subd. 3 (2010).

Plaintiffs met and, in some instances, exceeded the statutory requirements that other claimants met.¹ As in prior years in which they received statutorily-calculated per-acre incentive payments for their participation in the SFIA program, Meriweither, Blandin and Potlatch complied with the restrictions of the SFIA program and were eligible to receive per-acre payments in accordance with the then-existing statutory formula on October 1, 2010.

2. Like other SFIA participants, Plaintiffs faced significant penalties for removing land from the program.

Plaintiffs were also similarly situated to other SFIA enrollees because they faced significant penalties for removal of their land from the SFIA program. The SFIA statute

¹ In addition to the restrictive covenants and limited eligibility, enrollment, participation, and exit requirements of the SFIA, Respondents also granted public access to their lands in accordance with Minn. Stat. § 290C.03(a)(6).

ensures a minimum eight-year enrollment by prohibiting claimants from beginning the withdrawal process until land is enrolled for a minimum of four years, and then it imposes a four-year waiting period before withdrawal. See Minn. Stat. § 290C.10 (2010). After enrolling their land, Plaintiffs had to wait a minimum of four years before they could notify the Commissioner of Revenue that they intended to terminate enrollment. See Minn. Stat. § 290C.10 (2010). Termination of enrollment in the SFIA program does not occur until January 1 of the fifth calendar year that begins after receipt of the termination notice by the Commissioner. See *id.*

The SFIA imposes significant financial penalties for early withdrawal from the program, calculated as the last four years of incentive payments paid to the landowner. See Minn. Stat. § 290C.11 (2010). Like other SFIA claimants, these removal penalties restricted Plaintiffs' ability to use, sell, or develop their land. In exchange for abiding by these restrictions, the State promised to pay SFIA claimants an annual per-acre incentive payment, calculated by statutory formulae.

The State argues in its reply brief that the significant withdrawal penalties imposed by the plain language of the SFIA are somehow irrelevant to the Court's analysis here. See Appellants' Reply Mem. at 13-15. This is the first time the State has offered any substantive response (including in the District Court) to Plaintiffs' argument that these penalties impaired, if not eliminated, Plaintiffs' ability to withdraw from the program in the face of the drastic, unconstitutional cut in incentive payments that was first imposed with the 2010 cap of \$100,000. Each of the State's belated responses on this issue fails:

First, the State argues that “[t]he four-year waiting period [for withdrawal without penalty] imposes absolutely no burden on Respondents because they undisputedly engage in sustainable forest management practices for their own business interests, and they do so under the more rigorous private SFI and FSC certification programs in order to remain competitive in the forest-products industry.” Appellants’ Reply Mem. at 13-14 (emphasis added). That multi-million dollar penalties impose “absolutely no burden” is without any support in the record before this Court. Despite the State’s repeated and summary statements that the private certification programs are “more rigorous” than the SFIA, the State cannot point out any specific FSC or SFI requirement that is more rigorous than the SFIA (particularly as to public access, initial eight-year enrollment, and four-year withdrawal period). The record proves the contrary: among other things, the private certification programs do not mandate public access, as the SFIA does, and more significantly, Plaintiffs have the undisputed ability to take lands out of the certification programs at any time. Perhaps most significantly, the private certification programs contain no incentive payment for Plaintiffs. Thus, when the State acted to almost eliminate SFIA incentives to Plaintiffs by capping payments in 2010, Plaintiffs had no way of recouping those funds elsewhere, and yet their ability to change the way they use their land, or to sell it, was substantially constrained by the SFIA covenants that had to remain in place for four more years. The only alternative would have been to give notice of early withdrawal, which would have cost Plaintiffs millions of dollars – four years’ worth of prior SFIA payments. The private certification theory that the State’s lawyers have cultivated since this litigation was commenced (but that was plainly not in the

Legislature's mind in 2010) does not solve the immense problem created by the SFIA's substantial early withdrawal penalties.

Second, the State argues – in an apparently deliberate attempt to confuse the Court and obfuscate the real record here – that “Respondents could also withdraw land from the SFIA program by December 31, 2011, without application of the four-year waiting period.” Appellants’ Reply Mem. at 14. The State then cites the 2011 special legislation—passed more than a year after the 2010 legislation at issue on this appeal—and suggests that Plaintiffs had the ability to withdraw in 2010 to avoid the adverse impact of the 2010 cap. If anything, the State’s imprecision in arguing this issue points out a significant problem with the 2010 legislation that is before the Court on this appeal: by 2011, the Legislature understood that the significant withdrawal penalties created a huge problem for Plaintiffs (and a huge problem for the State in this litigation), and in 2011 the Legislature provided a window (albeit a very limited one) for removal of SFIA lands by large landowners affected by the cap. The State did not provide that opportunity for withdrawal without penalty in 2010, and Plaintiffs were faced in 2010 with the false choice of accepting diminished per-acre payments or paying back many millions of dollars in penalties.

Third, the State asserts that the penalties are not significant because Plaintiffs would only incur penalties for a “particular parcel of land found to be in violation of the covenant.” Appellants’ Reply Mem. at 14. Plaintiffs received payments of between \$0.38 and \$1.60 per acre for all of their lands enrolled in SFIA, rather than the statutory price of \$15.67 per acre. The State concedes, by this portion of its argument, that for

every acre affected by the State's unconstitutional actions, Plaintiffs would incur a penalty. Plaintiffs could have chosen to violate the covenants with respect to only a few acres, thereby reducing their penalty risk, but then the State must concede that with respect to all other acres, the penalty was a prohibitive obstacle to avoiding the damage done by the \$100,000 cap. The State's argument on this point does nothing to avoid the reality that Plaintiffs were stuck with four-year restrictions on their lands and a drastic reduction in the amount the State promised to pay them to accept those restrictions.

Finally, the State argues that the procedure passed in 2008 and codified in Minn. Stat. § 290C.13, subd. 7, allowing for an appeal of penalties under the SFIA, somehow eliminates the problem with the penalties. The State apparently concedes, however, that the penalties would have been imposed in the first instance, and it was only an appeal to the Commissioner's discretion that would have allowed for a reduction in penalties. Plaintiffs faced substantial risk of significant penalties being imposed (and the enforcement provision of § 290C.11(b) being invoked with the penalties being added to Plaintiffs' ad valorem tax bill), and the only relief provided in this portion of the statute is an appeal to the Commissioner's discretion (and the attendant attorneys' fees and delay that even an unsuccessful appeal would involve). Moreover, the statute provides that the Commissioner may settle a penalty appeal only "[w]hen it appears to be in the best interests of the state" Minn. Stat. § 290C.13 subd. 7. Given the State's arguments in this litigation, there is little reason to believe the Commissioner would conclude that waiving or forgiving substantial penalties in the SFIA program would be in the best interests of the state, and this appeal section gives Plaintiffs little comfort. Certainly, the

State cannot argue based on this provision that Plaintiffs did not face penalties. Again, Plaintiffs were stuck, and the State has no response – even at this late date – that takes the enormous penalties of the SFIA out of the equation.

3. There is no significant distinction between Plaintiffs’ SFIA-enrolled lands and other SFIA-enrolled lands.

Plaintiffs applied, enrolled, and complied with the SFIA restrictions on their lands the same as other SFIA participants. The State’s “manifestly arbitrary or fanciful” distinction between the similarly situated groups of SFIA landowners violates the constitutional guarantee of equal protection. *See Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 755 N.W.2d 713, 729 (Minn. 2008). Legislative classifications “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.” *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928) (internal citations omitted). “That is to say, mere difference is not enough: the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.” *Id.* (internal quotations omitted).

Not all participants in the program were capped in 2010, which is precisely the reason why the 2010 incentive payment cap violates the equal protection clauses of the United States and Minnesota Constitutions. In fact, only six participants were capped in 2010, including the three Plaintiffs. *See* Respondents’ Supplemental Record (“RSR”) 19.

The State argues that the 2010 annual incentive payment cap satisfies the rational basis standard because the “enormity” of Plaintiffs’ forest holdings distinguishes them from other enrollees. Appellants’ Reply Mem. at 25. By making this argument, the State ignores the codified purpose of the Sustainable Forest Incentive Act to preserve large tracts of forest land. *See* Minn. Stat. § 290C.01 (2010). Rather than reducing the per-acre incentive payments for all participants, the Legislature imposed a targeted cap that affected only the largest forest landowners. This action lacks a rational basis and undermines the intention of the law to establish incentives for preserving large areas of Minnesota’s forest lands.

B. A classification, such as the 2010 incentive cap, that discriminates against large forest owners does not further the purpose of the Sustainable Forest Incentive Act, and is thus without rational basis.

Under Minnesota law, “[t]he 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.” *Gluba by Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007). The Minnesota rational basis test applies a “higher standard” than the federal equal protection analysis. *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). The distinction drawn between the Plaintiffs and other smaller landowners bears no reasonable relationship to the Sustainable Forest Incentive Act because the cap removes the incentives to maintain actual forest areas (as opposed to

smaller non-contiguous plots of land). The classification ratified by the Legislature is an unfair distinction that erodes the purpose of the Sustainable Forest Incentive Act to protect Minnesota's large tracts of forest land.

1. The arbitrary cap classification is not relevant to the purpose of the law.

To survive an Equal Protection Clause challenge, the legislative classification “*must be genuine or relevant to the purpose of the law,*” provide an “evident connection between the distinctive needs peculiar to the class and the prescribed remedy,” and “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). Minnesota law requires “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 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”). The Act expressly states that it was “enacted to encourage the state's private forest landowners to make a long-term commitment to sustainable forest management.” See Minn. Stat. § 290C.01 (2011).

Plainly, the purpose of the Act is furthered by large landowners' participation in the SFIA program. A forest is “a plant association predominantly of trees and other

woody vegetation *occupying an extensive area of land.*” Minn. Stat. § 88.01, subd. 16 (emphasis added). By definition, “forest land” must be a large tract of land. See Minn. Stat. § 290C.02, subd. 6 (defining “forest land,” in part, as “land containing a minimum of 20 contiguous acres”); see also Minn. Stat. § 88.01, subd. 7 (stating that “forest land” means “land which is at least ten percent stocked by trees of any size and capable of producing timber, or of exerting an influence on the climate or on the water regime; land from which the trees described above have been removed to less than ten percent stocking and which has not been developed for other use; and afforested areas”). Indeed, the Sustainable Forest Incentive Act is intended protect Minnesota’s forests by creating an incentive to practice long-term sustainable forest management. See RSR 5.

The SFIA program balances for forest land owners the significant annual cost that ad valorem property taxes impose, which discourages long-term sustainable forest investments. See Minn. Stat. § 290C.01 (2011). Widespread participation in the SFIA program results in better conservation of Minnesota’s forest base and improved maintenance of the social and ecological values important to the citizens of Minnesota. See RSR 184 (“Recognizing the important economic role forests play in supporting local and state economies, as well as their ecological benefits, the 2001 Legislature created the SFIA.”). Rather than furthering the purpose of the statute, the State’s discriminatory cap on incentive payments to the largest forest landowners contradicts the purpose of the statute: Plaintiffs have little or no incentive, at rates of \$0.38 to \$1.60 per acre, to conserve their forest land using sustainable forestry principles.

As the Legislature concluded in Minn. Stat. § 290C.01, the weight of ad valorem taxes (without abatement under the SFIA) will discourage landowners from preserving large areas of an important public resource. The State's action in capping SFIA incentive payments defeated the very purpose of the Act. The State cannot now be heard to say that its action had a rational basis for furthering that purpose. By discriminating against claimants with more acreage, the legislative cap unfairly reduces or even eliminates incentives for larger land owners and weakens the purpose of the Act.

The State fails to acknowledge that the function of the Sustainable Forest Incentive Act was to encourage large landowners to enroll in the program by offering per-acre payments for their participation. The State cites *Lienhard v. State of Minnesota*, 431 N.W.2d 861 (Minn. 1988) to argue that the incentive cap does not violate the equal protection rights of Plaintiffs. However, in *Lienhard*, the Court noted that the effect of the tort liability limitations statute was the "protection of the fiscal integrity and financial stability of the State—an effect which is no doubt reflective of the purpose of the statute." *Id.* at 867. Here, the effect of the Sustainable Forest cap removes the incentives for large forest holders to engage in sustainable forestry practices—thereby contradicting the very purpose of the Act.

The cap imposed on sustainable forest incentive payments is also distinguishable from *Dandridge v. Williams*, where the United States Supreme Court held that Maryland's maximum grant regulation was constitutionally valid because it was "enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and

the families of the working poor.” See 397 U.S. 471, 486 (1970). Here, the State tries to justify the unconstitutional cap on incentive payments with the broad statement that the cap achieved the “objectives of addressing the State’s fiscal crisis, balancing the budget, and the use of public funds to make windfall payments,” which are “all legitimate ones for the state.” See Appellants’ Reply Mem. at 26 (internal citations omitted). This explanation for the cap lacks a rational basis because a different goal of the law is plainly stated in the text of the statute. See Minn. Stat. § 290C.01 (2010).

2. The State’s belatedly articulated rational basis is without merit.

The rational-basis standard “is not a toothless one,” and will not be satisfied by “flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys.” *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (Brennan, J. dissenting) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972)). Although the majority opinion in *Fritz* reaches a different conclusion than Justice Brennan’s dissent, 449 U.S. at 176 n. 10, the reasoning of the dissent is pertinent to Minnesota’s rational basis standard, which expressly requires that challenged legislative classifications be “genuine or relevant to the purpose of the law.” See *Gluba*, 735 N.W.2d at 721. The classification at issue here, which removes the incentive for sustaining large forests, directly conflicts with the stated purpose of Minn. Stat. § 290C.01 and therefore, “[t]he classification is not only rationally unrelated to the [legislative purpose]; it is inimical to it.” *Fritz*, 449 U.S. at 186 (Brennan, J. dissenting)

The Supreme Court’s decision in *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), while applying a federal rational basis standard that differs from the more difficult Minnesota standard, is also significant for its factual distinctions from the 2010 SFIA legislation that is before the Court on this appeal. In *Fritz*, the Court noted that when passing the Railroad Retirement Act of 1974, Congress specifically articulated the double payment problem posed by the earlier statute’s protocol for calculating benefits; acknowledged vested rights under the 1974 Act that it carefully preserved with its amendments; and stated how the 1974 amendments, which were challenged on Equal Protection grounds, would solve the double payment problem. *See id.* at 168–69 (“The legislative history of the 1974 Act shows that the payment of windfall benefits threatened the railroad retirement system with bankruptcy by the year 1981”; that “Congress therefore determined to place the system on a ‘sound financial basis’ by eliminating future accruals of those [double] benefits” and “expressly preserved windfall benefits for some classes of employees”). In other words, Congress clearly articulated its rational basis for the legislation when it passed the 1974 amendments that were challenged in *Fritz*.

In contrast, here the Minnesota Legislature did no such thing. Indeed, the record suggests that few of the rational basis arguments put forward by the State in this litigation were actually in the minds of legislators when the 2010 SFIA cap was ratified after Governor Pawlenty’s unallotment action. There is no indication in the 2010 legislation that legislators believed large SFIA participants would adopt and follow sustainable forestry methods even without the SFIA because of voluntary certification programs. To

the contrary, the 2010 Legislature, like the 2011 Legislature more than a year later, left in place the statutory purpose language of § 290C.01, which specifically says otherwise. The 2010 Legislature, like the Legislature in 2011, also did not add any exceptions to SFIA coverage to address a supposed concern about participation in voluntary programs. Although § 290C.03 has specific eligibility requirements for SFIA participation and the definition of “forest land” in § 290C.02, subd. 6 specifically excludes land that is enrolled in some other programs, the Legislature did not add participation in voluntary programs to either of these sections as a disqualifier for receiving SFIA payments. Why? Because this issue was not on the minds of legislators; the State came up with this theory after the fact, when Plaintiffs challenged the constitutionality of the 2010 cap in this litigation.

The State, again blending facts from 2011 into arguments about the 2010 legislation, cites language—“findings”—inserted into the SFIA statute over a year after the Legislature ratified the 2010 cap. See Appellants’ Mem. at 21. Essentially, after the cap was already imposed and after this litigation had commenced, the State inserted new language to suggest an alternative statutory purpose in an effort to shore up the discriminatory cap. The Legislature did not insert the new legislative findings into Minn. Stat. § 290C.07 until July 2011 and it did nothing to change the original purpose language in Minn. Stat. § 290C.01. See 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6 §§ 12, 26.

Likewise, the State’s new windfall argument (that Plaintiffs, somehow unlike smaller landowners, would experience a windfall if they receive \$15.67 per acre because the State made an “error” in setting the formula for 2010) was not on the minds of

legislators in 2010. As the record reflects, the Legislature was not even aware of the rate that the new formula would produce for 2010 payments when it passed the cap in 2010; presumably the Legislature would have “fixed” that “error” had it known when it passed the cap that the per-acre rate was going to be a “windfall” rate. In short, unlike Congress in the *Fritz* case, the Minnesota legislature did not articulate the alleged rational basis now constructed by the State’s lawyers in this litigation. The distinctions between Plaintiffs and smaller landowners are without rational basis, as related to the purpose supporting the SFIA, and should be held unconstitutional.

C. Under Equal Protection principles, Plaintiffs are entitled the full \$15.67 per-acre rate paid to other SFIA participants for 2010.

Just as Equal Protection principles dictate rejection of the low per-acre amounts the State actually paid Plaintiffs in 2010, an Equal Protection analysis leads to the conclusion that the District Court’s \$10.38 per-acre rate was erroneous.

The State repeatedly argues that the statutory formulae resulting in \$15.67 per acre payments to SFIA claimants in 2010 was an “error.” The State also tries to evade its obligations to Plaintiffs and other SFIA participants with large forest holdings by characterizing their participation in the program as a “windfall.” However, any “errors” or “windfalls” resulting from calculating the per-acre incentive payments in 2010 were created by the State’s deliberate statutory scheme. Discrimination against the large forest owners who fully complied with the SFIA program is not an appropriate remedy for a drafting or calculation error by the Legislature.

Further, contrary to the representations made by the State, Plaintiffs do not all participate in the forest land certification programs of the Forest Stewardship Council (“FSC”) and the Sustainable Forest Initiative (“SFI”). However, even if they did, these voluntary certification standards offered by these non-profit organizations impose nowhere near the same requirements of the SFIA statutory program. Neither FSC nor SFI require any covenants, contracts, withdrawal penalties, or public access. The State summarily asserts that the voluntary private certification standards are more stringent, but nothing in the record supports that proposition: none of the programs impose restrictive covenants requiring public access or penalties for removal. Significantly, the Legislature did not create any exceptions in the SFIA statute for lands that are certified under private, voluntary programs. Cf. Minn. Stat. § 290C.02, subd. 6 (creating exceptions for lands enrolled in other specific programs, including lands enrolled in the reinvest in Minnesota program, but not addressing the SFI or FSC private certification programs). Furthermore, Plaintiffs’ participation in other voluntary forest stewardship efforts does not excuse the State’s unequal treatment of Plaintiffs even though they fulfilled the same—or more rigorous—requirements of the SFIA in exchange for the promise of per-acre incentive payments.

CONCLUSION

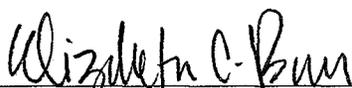
The State violated the Equal Protection Clauses of the United States and Minnesota Constitutions when it treated Plaintiffs differently than other similarly situated Sustainable Forest Incentive Act participants by capping incentive payments in 2010. The State’s arbitrary classification based on the size of forest land lacks a rational basis

and is not relevant to the purpose of the Sustainable Forest Incentive Act. Plaintiffs respectfully request that the State be ordered to use the statutory formulae to calculate the 2010 incentive payments owed to Plaintiffs at the \$15.67 per-acre rate paid to other SFIA claimants in 2010.

Respectfully submitted,

BEST & FLANAGAN LLP

Dated: February 6, 2012.



Sarah E. Crippen (#223074)
Timothy A. Sullivan (#107165)
Elizabeth C. Borer (#389943)
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402-4690
612.339.7121

scrippen@bestlaw.com
tsullivan@bestlaw.com
eborer@bestlaw.com

019514/311001/1448466_1

State of Minnesota
In Court of Appeals

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

vs.

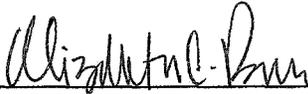
State of Minnesota; Myron Frans, Commissioner, Minnesota Department of Revenue,
Appellants.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a 13-point, Times New Roman font. The length of this brief is lines 535 and 5,108 words. This brief was prepared using Microsoft Word 2007.

BEST & FLANAGAN LLP

Dated: February 6, 2012.



Sarah E. Crippen (#223074)
Timothy A. Sullivan (#107165)
Elizabeth C. Borer (#389943)
225 South Sixth Street, Suite 4000
Minneapolis, MN 55402-4690
612.339.7121

scrippen@bestlaw.com
tsullivan@bestlaw.com
eborer@bestlaw.com