

a surplus in the poor fund could not be used in the current budget for the reason that no appropriation had been made for such an expenditure, as Sec. 4613.2 provides in part:

"Expenditures for capital outlay shall set forth and describe each object of expenditure separately . . ."

Opinion No. 169.

**Surplus Funds—Hospitals, County
Hospitals—Poor Fund.**

Held: A surplus in the poor fund at the end of a fiscal year may be used in the next ensuing year for the construction of a county hospital providing the budget for the latter year appropriates such funds for such capital expenditure as an item of the poor fund.

June 19, 1946.

Mr. H. R. Eickemeyer
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Eickemeyer:

You advise me there will be a surplus in the poor fund of Cascade County at the end of the fiscal year. It is anticipated that the surplus will be \$100,000.00 and sufficient to build a county hospital. You request my opinion concerning the procedure to be followed in the use of the surplus for the construction of the hospital.

In a recent opinion of this office, Opinion No. 143, Volume 21, Report and Official Opinions of the Attorney General, it was held that "the surplus in any item in the current budget is carried over to the same item in the budget for the next fiscal year." A surplus in the poor fund would be available for the use of the poor fund in the next ensuing year. Section 4613.2, Revised Codes of Montana, 1935, fixes the general form of the budget and designates classifications, one of which is "capital outlay." Thus the surplus would be available in the poor fund for the construction of a hospital.

In a previous opinion written for your office, Opinion No. 30, Volume 21, Report and Official Opinions of the Attorney General, it was held that

In the budget for the next fiscal year, I assume you will provide for such an expenditure and satisfy the, above quoted portion of Section 4613.2, and also the prohibition found in Section 4613.5, which provides that expenditures in excess of budget appropriations are not liabilities of the county.

It was also suggested in my prior opinion that Section 5 of Article XIII of the Montana Constitution which requires the approval of the electorate before a county may incur an indebtedness of liability in excess of \$10,000.00 would preclude such an expenditure. Authorities were cited to substantiate this contention, but such early Montana cases are no longer pertinent due to a recent ruling of our Supreme Court in the case of *Graham v. Board of Examiners*, 155 Pac. (2d) 956, wherein it was held that a debt or liability is not created from the appropriation of surplus funds. The court said in the *Graham* case:

"It has repeatedly been held by this court that there is no debt or liability created when there is cash on hand of revenue provided by the legislature for the biennium to meet the appropriation . . ."

"The appropriation of surplus funds does not create a 'debt or liability' and, hence, the question of appropriating more than \$100,000.00 of such surplus need not be submitted to a vote of the people under Section 2 of Article XIII. There is no other constitutional provision requiring approval of the people.

"Whatever may be said in favor of the right of the people to be heard directly on what a surplus should be expended for, is a subject that addresses itself to the need of a constitutional amendment. There is nothing in the Constitution now that requires it."

The same reasoning would apply with equal force to an interpretation

of Section 5, Article XIII as would apply to Section 2, Article XIII of our Constitution, and therefore in the expenditure of surplus funds, the approval of the electorate is not necessary.

The fact the surplus in the poor fund has increased in a material amount this last fiscal year would indicate the budget had not been fixed in conformity with the rule adopted by our Supreme Court in *Rogge v. Petroleum County*, 107 Mont. 36, 80 Pac (2d) 380, which reads:

“It is against the policy of the law to raise taxes faster than the money is likely to be needed by the government, and, in the absence of statutory authority, a tax cannot be levied for the sole purpose of accumulating funds in the public treasury, such as for remote or future contingencies that may never occur; nor can it be levied in excess of the amount required for the purpose for which it is levied, with the intention of using the excess for another purpose.”

It is therefore my opinion that a surplus in the poor fund at the end of a fiscal year may be used in the next ensuing year for the construction of a county hospital providing the budget for the latter year appropriates such funds for such capital expenditure as an item in the poor fund.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General