

VOLUME NO. 40

OPINION NO. 25

APPROPRIATIONS - Application of budget amendment process;

APPROPRIATIONS - Definition;

BUDGET AMENDMENTS - Contrasted with appropriations;

STATE AGENCIES - Expenditures in excess of appropriations;

MONTANA CODE ANNOTATED - Sections 5-12-101 to 5-12-402;

1889 MONTANA CONSTITUTION - Article V, section 34;

1972 MONTANA CONSTITUTION - Article VIII, section 14.

HELD: The budget amendment process does not apply to appropriation measures enacted by statute.

31 October 1983

David M. Lewis, Budget Director
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Dear Mr. Lewis:

I have received your request for an opinion on the following questions:

1. What constitutes an "appropriation"?
2. Does the budget amendment process apply in any way to statutory appropriations?

In response to your first question, the definition of "appropriation" must, by necessity, be couched in very general terms and applied on a case-by-case basis. Since no definition of "appropriation" is supplied in the Montana statutes, an examination of the relevant case law is in order. Indicia of an appropriation, according to the case law, include: the setting apart of a specified sum of money for a particular use, object, or person, State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, 7, 238 P. 316, 320-21 (1925); the granting of specific authority to spend the funds, State ex rel. Haynes v. District Court, 106 Mont. 470, 480, 73 P.2d 937, 943 (1938); and an expression of an intention by the people that the money in question be disbursed, First National Bank in Bozeman v. Sourdough Land and Cattle Company, 171 Mont. 390, 397, 558 P.2d 654, 657 (1976), and State ex rel. Dean v. Brandjord, 108 Mont. 447, 454, 92 P.2d 273, 276 (1939). With respect to the requirement that there be a setting apart of a specific sum of money, the case law suggests that this requirement may be met even though no exact sum is mentioned, so long as a maximum amount is stated, or the special fund from which the money is to be expended is itself limited in amount. State ex rel. Dean v. Brandjord, 108 Mont. at 456, 92 P.2d at 277.

By contrast, features that do not indicate that an appropriation has been made include: the need for additional independent legislation in order to disburse the funds in question, State ex rel. Haynes v. District Court, 106 Mont. at 480, 78 P.2d at 943; and a mere promise or imposition of a duty on the Legislature to appropriate, First National Bank in Bozeman v. Sourdough Land and Cattle Company, 171 Mont. at 397, 558 P.2d at

658, and State ex rel. Dean v. Brandjord, 108 Mont. at 455, 92 P.2d at 276.

While these tests for determining whether a particular statute is an appropriation are somewhat general and thus do not lend themselves to precise application, they do provide a starting place for addressing your inquiry. A more detailed response would require the examination of specific legislation.

Your second question concerns whether the budget amendment process applies to statutory appropriations. According to the staff memorandum that accompanied your request for an opinion, your use of the term "statutory appropriations" is meant to encompass those appropriations that have been made either by an express act of appropriation or by an act of the Legislature without a specific appropriation bill. Some background concerning the use of terms is appropriate. The 1972 Montana Constitution, article VIII, section 14 (formerly article V, section 34 of the 1889 Montana Constitution), provides that "no money shall be paid out of the treasury unless upon an appropriation made by law...." (Emphasis added.) As noted in the staff memorandum accompanying your letter, Montana case law has interpreted the phrase "appropriation made by law" to include not only appropriations made by legislative enactment but also those accomplished by a provision in the state constitution. State ex rel. Buck v. Hickman, 10 Mont. 497, 26 P. 386 (1891); State ex rel. Rotwitt v. Hickman, 9 Mont. 370, 23 P. 740 (1890).

With respect to those appropriations made by legislative enactment rather than by constitutional directive, the Montana Supreme Court has determined that they do not require specific appropriation bills in order to constitute "appropriations made by law." Thus, in State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, 238 P. 316 (1925), an act authorizing the State Board of Examiners to issue and sell treasury notes and to deposit the proceeds therefrom in the general fund, to be used exclusively for the payment of outstanding warrants against the general fund, was held to be an appropriation, even though there was no direct appropriation authorizing a withdrawal from the general fund. Likewise, in State ex rel. Dean v. Brandjord, 108 Mont. 447, 92 P.2d 273 (1939), it was determined that an "appropriation made by law" did not require the

introduction of an appropriation bill. See also First National Bank in Bozeman v. Sourdough Land and Cattle Company, 171 Mont. 390, 558 P.2d 654 (1976).

For the purposes of this opinion, I will assume that your second question regarding the applicability of the budget amendment process to "statutory appropriations" refers to those appropriations accomplished by legislative enactment, either with or without introduction and passage of specific appropriation bills, as is permitted by the above-cited law.

In order to determine whether the budget amendment process applies to these statutory appropriations, it is necessary to analyze the intent of the budget amendment legislation. The budget amendment process, first enacted in 1975 as a part of the Legislative Finance Act (see Tit. 5, ch. 12, MCA), and amended in 1983 (1983 Mont. Laws, ch. 536), requires, inter alia, that budget amendments be certified by the approving authority and submitted through the Legislative Fiscal Analyst to the Legislative Finance Committee before final approval. An examination of the minutes of discussions by the legislative committees which considered the budget amendment procedure in 1975 and 1983 indicates that the term "budget amendment" refers to appropriations measures that involve expenditures over and above the funds appropriated during a regular legislative session. See Senate State Administration Committee, Consideration of SB 401, Feb. 26, 1975; House Finance and Claims Committee, Consideration of SB 401, March 19-20, 1975; Senate Finance and Claims Committee, Consideration of HB 548, March 16, 1983; House Appropriations Committee, Consideration of HB 548, Feb. 17, 1983. The definition of "budget amendment" included in the 1975 Legislative Finance Act (§ 5-12-102(1), MCA) speaks of "funds in excess of those appropriated by the legislature." In the 1983 amendments (1983 Mont. Laws ch. 536, § 1(4)), the definition of "budget amendment" uses the words, "an appropriation to increase spending authority." The scope of the budget amendment process is explained in Board of Regents of Higher Education v. Judge, 168 Mont. 433, 441, 543 P.2d 1323, 1328 (1975), as extending to those expenditures by State agencies in excess of their appropriations.

The above-cited sources support the conclusion that the scope of the budget amendment process is restricted to

the expenditure of funds by State agencies in excess of their appropriations.

THEREFORE, IT IS MY OPINION:

The budget amendment process does not apply to appropriation measures enacted by statute.

Very truly yours,

MIKE GREELY
Attorney General