

Opinion No. 15.

Constitutional Law—Appropriations—Statutes.

HELD: A judgment obtained against the State of Montana on account of the Custer Drainage District in Yellowstone County may not be paid by the State Treasurer upon order of the District Court, as provided in Section 7326, without a specific appropriation by the Legislature.

January 26, 1939.

Honorable R. H. Gebhardt
The House of Representatives
The Capitol

Dear Mr. Gebhardt:

You have submitted to this office the question whether or not it is necessary to have an appropriation in order to pay the amount of the judgment against the State of Montana in the sum of \$1,652.13, on account of the Custer Drainage District in Yellowstone County.

Section 34, Article V of the Montana Constitution provides:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt."

Section 10, Article XII of the Montana Constitution reads as follows:

"All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

In view of these constitutional provisions, it is my opinion that the State Treasurer would not have authority to pay the amount of the judgment in question without a specific appropriation by the Legislature, even though Section 7326 R. C. M. 1935 provides that payment may be made upon presentation to the State Auditor of an order of the district court having jurisdiction of such drainage district. The Legislature did not have authority to authorize the payment upon an order of the district court without a specific

appropriation. I am supported in this view by the case of *In re Pomeroy*, 51 Mont. 119, 151 Pac. 333. In that case the court had occasion to pass upon a similar statute having to do with escheated estates. The statute provided that the judgment in the proceeding should order the auditor to draw his warrant on the treasury for the payment of the same. The court said (p. 126):

"* * * In so far as Section 7359 above authorizes a judgment that the auditor draw his warrant in the absence of an appropriation, it is in direct conflict with the mandates of the Constitution and invalid."

It is therefore my opinion that a specific appropriation by the legislature is necessary in order to permit the auditor to draw his warrant to pay the judgment obtained.

Section 7326, *supra*, provides that the auditor shall draw his warrant on the treasurer on the common school fund in favor of the commissioners of the drainage district. I am advised by the State Auditor that there is no fund set up by the State Treasurer known as "the common school fund"; that the funds are known as the "common school equalization fund" and the "common school permanent fund." So far as the common school permanent fund is concerned, the Legislature would not have authority to use any part of such fund except for the purpose stated in the Constitution and the Enabling Act, as such fund is a trust fund for the benefit of the public schools. See opinion of this office dated January 5, 1939, to Honorable Howard A. Johnson, Chief Justice of the Supreme Court of Montana, relating to the validity of the amendments to Article XXI of the Montana Constitution, voted upon at the recent general election.