

Dear Mr. Young:

You advise me that there is a surplus in the sinking and interest fund which is much greater than the amount necessary to meet the installments due on principal and the interest due during the fiscal year. You state that the Board of County Commissioners desires to use the surplus to construct a county hospital and thus avoid incurring any bonded indebtedness. You ask my opinion concerning such a use of surplus funds.

Our Supreme Court in *Rogge v. Petroleum County*, 107 Mont. 36, 80 Pac. (2d) 380, condemned a tax levy which was in excess of the amount likely to be needed by the government. The court quoted the following with its approval:

"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."

The foregoing is quoted only for the purpose of defining the policy concerning the levy of taxes and the creation of a surplus. In *Rogge v. Petroleum County*, supra, an attack was made by a taxpayer on the levy, but under the facts under consideration the excessive levy has been made, the taxes have been paid and the surplus is an accomplished fact.

The use of the surplus under the present budget for constructing a hospital could not be done as there is no appropriation or provision in the budget for such an expenditure as Section 4613.5, Revised Codes of Montana, 1935, provides in part:

"Expenditures made, liabilities incurred, or warrants issued, in excess of any of the budget detailed appropriations as originally determined, or as thereafter revised by transfer, as herein provided, shall not be a liability of the county, but the official making or incurring of such expenditure or issuing such warrant

Opinion No. 143.

**Surplus, Sinking and Interest Fund—
Sinking and Interest Fund, Surplus—
Fund, Surplus—County Commissioners—
Hospital.**

Held: A surplus in the sinking and interest fund cannot be used in the next ensuing fiscal year for the construction of a county hospital, for under the mandatory provision of the budget law, such surplus must be transferred to the general fund and thus be available as cash on hand with a reduction in the tax levy for such fund for the ensuing year and resulting relief to each taxpayer.

April 13, 1946.

Mr. Denzil R. Young
County Attorney
Fallon County
Baker, Montana

shall be liable therefor personally and upon his official bond."

Any surplus remaining in the sinking and interest fund and not needed for any bond issue which is outstanding shall be transferred to the general fund of the county under the mandate of Section 4630.27, Revised Codes of Montana, 1935.

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 general fund is available for the use of the general fund of the next ensuing year. Section 4613.2, Revised Codes of Montana, 1935, provides the county clerk shall prepare a tabulation of the expenditures and the receipts from all sources and "the surplus or unencumbered treasury balances at the close of the fiscal year." The use of the word "balance" indicates that each surplus is carried over to the identical fund. Our court in *Rogge v. Petroleum County*, supra, recognized this by the statement:

"That the board of county commissioners in preparing its budget and making its levy must take into consideration the amount of money already available in each fund for which a levy is made, is made plain by sections 4613.1, 4613.2 and 4613.4." (Emphasis mine.)

It, thus, follows the surplus now in the sinking and interest fund must be transferred to the general fund at the end of the current fiscal year.

In view of my conclusions above, it is not necessary to consider the question of the submission of the incurring of indebtedness to a vote of the electors of the county as provided in Section 5 of Article XIII of the Montana Constitution.

It is therefore my opinion a surplus in the sinking and interest fund cannot be used in the next ensuing fiscal year for the construction of a county hospital, for under the mandatory provision of the budget law, such surplus must be transferred to the general fund and thus be available as cash on hand with a reduction in the tax levy for such fund for the ensuing year, and resulting relief to each taxpayer.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General