

**Opinion No. 104**

**Constitutional Law—Powers of Governor; May Call National Guard to Active Duty; May Order Warrants for Pay and Expenses When Called to Active Duty in Disaster—National Guard; May Be Paid From General Fund When Called to Active Duty in Disaster.**

**Held:** The Governor has the power to order payment of claims for expenditures for the National Guard when the guard is duly called to active service in an emergency.

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July 11, 1952.

Honorable John W. Bonner  
Governor of Montana  
State Capitol Building  
Helena, Montana

Dear Governor Bonner:

You have requested my opinion as to whether or not payment can be made for the National Guard from the general fund for expenses necessarily incurred in meeting the emergencies arising out of the disastrous floods in Montana this spring.

The National Guard is the organized branch of the State Militia, Section 77-102 and 77-106, Revised Codes of Montana, 1947.

On the 2nd day of April, 1952, Acting Governor Cannon issued a proclamation of emergency and threatened emergency in the flooded area.

Immediately upon the issuance of said proclamation the National Guard was alerted and called upon to render aid and assistance. Pursuant to the provisions of Section 2 (d), Chapter 29, Montana Session Laws of 1949, (The

Disaster Council Act) the Montana National Guard is entrusted with the duty to act in the event of emergency.

On the 5th day of April, and on the 8th day of April, Governor Bonner, by separate proclamation, included additional areas of emergency as the disaster spread.

The records show that this unit of the National Guard was ordered into service pursuant to the declaration of emergency by Acting Governor Cannon and the further declarations of Governor Bonner. The Montana Constitution, in Article VII, Section 6, provides that the Governor shall be Commander-in-Chief of the militia forces of the State and shall have power to call out any part of said forces to aid in the execution of the laws, to suppress insurrection, or to repel invasion.

Section 77-107, Revised Codes of Montana, 1947, provides in part as follows:

"In event of war, insurrection, rebellion, invasion, tumult, riot, mob, or body of men acting together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of this state, or the United States, or in case of the imminent danger of the occurrence of any of said events, or in event of public disaster, the governor shall have power to order the organized militia of Montana, or any part thereof, into the active service of the State, and to cause them to perform such duty as he shall deem proper. \* \* \*"

Thus, it is clearly provided by the legislature that the Governor may call into active service the organized militia.

Section 77-151, Revised Codes of Montana, 1947, as amended by Chapter 20, Laws of 1949, states:

"All bills, claims, and demands against the national guard appropriation shall be certified or verified in the manner prescribed by regulations promulgated by the governor, and shall be audited and approved by the adjutant-general, and, if allowed, by the state board of examiners, shall be paid by the state treasurer upon the warrant of the state auditor from the national guard appropriation; provided, however,

that in all cases where the organized militia or any part thereof is called into the service of the state in case of war, riot, insurrection, invasion, breach of the peace, disaster, or in aid of the civil authorities, warrants for allowed pay and expenses for such service shall be drawn upon the general fund of the state treasury and paid out of any moneys in said fund, on the order of the governor."

It is significant that the 31st legislative assembly amended 77-151 by adding to the enumeration of events calling for the services of the militia the case of disaster.

In the 31st assembly there was also passed the bill establishing the disaster council which provides in part:

"(d) The council shall direct state disaster relief activities through the state agencies hereinafter enumerated, which agencies are required, when notified by the governor that an emergency exists, to perform such duties as the council may direct. Such duties shall include, but are not limited to, the duties herein enumerated."

While no appropriation was made for carrying out of the provisions of the Disaster Council Act, it is undoubtedly correct that the legislature could not envision the character of disaster which might occur, thus making it impossible to set aside any definite appropriation for that purpose.

The exigencies of a disaster must be met as they arise and to cope with such a situation the legislature provided in Chapter 1 of Title 77 for the meeting of such.

By specific provision the legislative assembly has provided for the pay of officers and enlisted men when on the call of the Governor. Section 77-154, Revised Codes of Montana, 1947, states in part:

"Commissioned officers while on duty pursuant to the orders of the governor (other than at assemblages for drill or instruction, or on examining boards at or in the vicinity of their home stations, or when called or ordered out by the president of the United States), and while on duty in aid of the civil authorities pursuant to the lawful orders of the

governor, shall receive the same pay and allowances as officers of the United States of the same grade; provided, that for travel only actual necessary expenses shall be allowed.

While on duty pursuant to the orders of the governor (other than at assemblages for drill or instruction at or in the vicinity of their home stations, or when called or ordered out by the president of the United States), and while on duty in aid of the civil authorities pursuant to the lawful orders of the governor, enlisted men of the national guard of Montana shall receive pay at rates equivalent to twice those allowed for corresponding grades in the United States army."

Section 77-151 as amended (supra) provides for the method of paying claims arising out of the emergency suant to the call of the Governor. act of the National Guard acting pur-

The flood disasters in northern and eastern Montana this spring required immediate action on the part of the State Militia to protect the life and property of the citizens of the State, to assist the local authorities in the execution of law and security provisions of our statutes, and to effectively execute the provisions of the Disaster Council Act of 1949.

When faced with an emergency of such nature immediate action must be taken. This was done by the National Guard and militia upon the occasion of the disastrous floods and the superlative action on the part of our state meeting the exigencies of the emergency was of utmost importance in their efficient and excellent conduct.

Therefore, it is my opinion that by virtue of the constitutional provisions and the statutes cited above, the Governor has authority to order warrants for allowed pay and expenses, and properly certified claims to be paid out of the general fund.

Very truly yours,  
ARNOLD H. OLSEN  
Attorney General