

VOLUME NO. 36

Opinion No. 2

APPROPRIATIONS — Bills, university system; APPROPRIATIONS — Limitations, university system; CONSTITUTIONAL LAW — Appropriations, university system; CONSTITUTIONAL LAW — Investments, university system; CONSTITUTIONAL LAW — Public funds, fiscal control; EDUCATIONAL INSTITUTIONS — Appropriations, terms and conditions; EDUCATIONAL INSTITUTIONS — Employees, benefits; EDUCATIONAL INSTITUTIONS — Investments, public funds; INVESTMENTS — University systems; LEGISLATURE — Appropriations; LEGISLATURE—Powers; STATE—Funds, appropriation of; STATE BOARD OF EDUCATION — Powers, investments; STATE

TREASURER — Funds, custodian of; UNIVERSITY SYSTEM — Appropriations, limitations; UNIVERSITY SYSTEM — Employees, benefits; UNIVERSITY SYSTEM — Funds, deposit of; UNIVERSITY SYSTEM — Funds, investment of. Article III, section 1; Article VIII, sections 12 and 13; Article X, sections 9 and 10; Constitution of Montana (1972); sections 59-1001, 59-1007, 79-201, 79-301, 79-306, and 82A-204, R.C.M. 1947.

- HELD:**
- 1. The provisions of sections 79-308 and 82A-204, R.C.M. 1947, relating to the investment of state moneys are applicable to the board of regents of higher education and the separate units of the Montana university system.**
 - 2. The provisions of section 59-1001, et seq., R.C.M. 1947, relating to employee benefits and vacation leave are applicable to employees of the separate units of the Montana university system except those persons who would qualify as "school teachers" under the provisions of section 59-1007, R.C.M. 1947.**
 - 3. The provisions of section 79-306, R.C.M. 1947, designating the state treasurer as the treasurer of every state agency and institution and requiring the daily deposit of all moneys, credits, evidences of indebtedness, and securities, either in financial institutions designated by the state treasurer or with the state treasurer, are applicable to the board of regents and the separate units of the Montana university system and the public funds under their control and supervision.**
 - 4. The line-item appropriations and conditions attached thereto contained in House Bill 55, Montana Session Laws of 1973, are constitutionally permissible and binding on the board of regents of higher education and the separate units of the Montana university system.**

January 31, 1975

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion on the following questions:

Are the board of regents and the separate units of the Montana university system required to comply with legislative enactments and administrative regulations in the following areas:

- (1) Investment of state moneys under the provisions of sections 79-308 and 82A-204, R.C.M. 1947.
- (2) Employee benefits and vacation leave under the provision of section 59-1001, R.C.M. 1947.

(3) Fiscal control and deposit of revenues in the state treasury under the provisions of section 79-306, R.C.M. 1947.

(4) Appropriations, either line-item or by program, which were authorized by the passage of House Bill No. 55, Montana Session Laws of 1973.

Question 1: Montana's Constitution, Article X, section 9 (1972), provides for a board of regents of higher education which is one of two boards that make up the state board of education. Subsection (2) of Article X, section 9, provides in part:

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

The powers and duties of the board of regents of higher education, hereinafter referred to as "Regents", are more specifically defined in chapters 81 and 84 through 88 of Title 75, R.C.M. 1947.

The investment of state university funds is governed by two separate articles of Montana's constitution. Article X, section 10, provides, in part:

... The various funds (of the Montana university system) shall be respectively invested under such regulations as **may be provided by law**, ... (Emphasis supplied)

Article VIII, section 13, provides, in part:

(1) **The legislature shall provide for a unified investment program for public funds** and provide rules therefor,... (Emphasis supplied)

(2) ... (T)he permanent funds of the Montana university system and all other state institutions of learning shall be safely and conservatively invested in:

(a) Public securities of the state, its subdivisions, local government units, and districts within the state, or

(b) Bonds of the United States or other securities fully guaranteed as to principal and interest by the United States, or

(c) Such other safe investments bearing a fixed rate of interest as **may be provided by law**. (Emphasis supplied)

The legislature has provided for a unified investment program for public funds. Section 82A-204, R.C.M. 1947, creates a board of investments and specifically provides, in part:

(4) The board of investments has the sole authority to invest state funds. No other agency may invest state funds. ...

Section 79-301, et seq., R.C.M. 1947, defines the manner in which state funds shall be deposited with the state treasurer and invested by the board of investments.

Both Article X, section 10, and Article VIII, section 13, mandate that funds of the Montana university system shall be invested in a unified investment program which is to be established by the legislature. The legislature has established such a program under the provisions of sections 82A-204 and 79-301, et seq., R.C.M. 1947.

It further appears that it was the intent of the 1972 Constitutional Convention to require that the funds of the university system be invested as provided for by the legislature and that the provision of Article VIII, section 13, would govern such funds. At page 6585, Transcript of Proceedings, Montana Constitutional Convention (1972), Delegate Champoux stated to Chairman Graybill that the investment of university system funds had:

... already been taken care of in the Revenue and Finance article under investments, ...

Thus, it is abundantly clear that the provisions of sections 82A-204 and 79-301, et seq., R.C.M. 1947, apply to the investment of state funds under the control and supervision of the Regents and the separate units of the Montana university system.

Question 2: You have next asked whether the provisions of section 59-1001, R.C.M. 1947, relating to employee benefits and vacation leave, apply to the Regents and the separate units of the Montana university system.

The context in which this question arises is House Bill 55, Montana Session Laws (1973). House Bill 55 was an act of the legislature appropriating moneys to various state agencies, including the Regents and the various units of the Montana university system.

Section 14, House Bill 55, provided:

The provisions set forth in this section are limitations on the appropriations made in this act,... . It is the purpose of the legislature in enacting this bill only to appropriate funds and to restrict and limit by its provisions the amount and conditions under which the appropriations can be expended. Except as otherwise provided in this act, the expenditures of appropriations are hereby subject to the following general and specific provisions:

(1) All expenditures of funds appropriated by this act for purpose of travel, transportation, and vacation and sick leave are subject to the provisions of the law expressed in title 59, R.C.M. 1947.

Title 59, chapter 10, R.C.M. 1947, governs leaves of absence for state employees except as provided for in section 59-1007, R.C.M. 1947. Section 59-1007, supra, specifically excludes "school teachers" from the provisions of title

59, chapter 10, supra, and the Montana Supreme Court has indicated that the term "school teacher" as used in section 59-1007, supra:

...refers to those teaching at district schools as well as in the state's system of higher education... Teamsters, etc. v. Cascade County School Dist. No. 1, _____Mont._____ 511 P.2d 339, 341 (1973). (Emphasis supplied)

Thus, I would conclude that the limitation placed on appropriations to the Regents and the separate units of the Montana University system contained in section 14, House Bill 55, are applicable to all state employees except those faculty members who are teaching in the state's system of higher education and who would qualify as "school teachers" under the provisions of section 59-1007, supra.

Question 3: Your next question asks whether the Regents and the separate units of the Montana university system must comply with legislative enactments regarding fiscal control, particularly, section 79-306, R.C.M. 1947, which requires the deposit of all revenue in the state treasury.

The Constitution of Montana, Article VIII, section 12 (1972), provides:

The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities. (Emphasis supplied)

The legislature has designated the state treasurer in section 79-201, R.C.M. 1947, as the:

...custodian of all moneys and securities of the state unless otherwise expressly provided by law, and it is the duty of the state treasurer:

1. **To receive and account for all moneys belonging to the state, not expressly required by law to be received and kept by some other person. (Emphasis supplied)**

Section 79-306, R.C.M. 1947, further provides:

(1) **The state treasurer is designated the treasurer of every state agency and institution.**

(2) **All state agencies and institutions shall deposit daily all moneys, credits, evidences of indebtedness, and securities either in banks, building and loan associations or savings and loan associations located in the city or town in which the agencies and institutions are situated if there is a qualified bank, building and loan association or savings and loan association in the city or town as designated by the state treasurer with the approval of the board of investments, or with the state treasurer. ... (Emphasis supplied)**

It is apparent that the legislature is the constitutionally appointed branch of state government responsible to account for state funds and that it has designated the state treasurer as the custodian of those funds. A systematic depository procedure has been established under the provisions of section 79-306, supra, which requires "all state agencies and institutions" to deposit their

daily receipts in a banking facility "designated by the state treasurer — or with the state treasurer". In either case, the state treasurer will have a record or will be able to procure one from an independent source of the daily cash flow experienced by any particular state agency or institution.

It should be noted that Article VIII, section 12, refers to "all revenue"; that section 79-201, supra, refers to "all moneys"; and that section 79-306, supra, refers to "all state agencies and institutions" and "all moneys". The only funds or agencies exempt from these provisions are those which are expressly declared to be by the constitution or legislative enactment. No such express exemption exists for state funds in the hands of the Regents or the separate units of the Montana university system. Therefore, I conclude that the provisions of section 79-306, R.C.M. 1947, designating the state treasurer as the treasurer of every state agency and institution and requiring the daily deposit of all moneys, credits, evidences of indebtedness, and securities, either in financial institutions designated by the state treasurer or with the state treasurer, are applicable to the Regents and the separate units of the Montana university system and the public funds under their control and supervision.

Question 4: Finally, you have asked whether the Regents and the separate units of the Montana university system must comply with the program appropriations and conditions set forth in House Bill 55, Montana Session Laws of 1973.

House Bill 55 is an act appropriating moneys to various state agencies within the Department of Education for the biennium ending June 30, 1975. Sections 1 through 15 of House Bill 55 contain, inter alia, terms and conditions attached to the specific appropriations.

For instance, section 7 provides:

Transfer of appropriated funds between programs of an agency may be made only by an approved budget amendment.

Section 13 provides, in part:

| UNIVERSITY OF MONTANA | | |
|-------------------------------|----------------------------------|----------------------------------|
| | Fiscal Year ending 6/30/74 | Fiscal Year ending 6/30/75 |
| Programs: | | |
| Instruction | 8,782,034 | 9,105,579 |
| Organized Research | 173,527 | 182,695 |
| Public Service | 97,455 | 102,618 |
| Academic Support | 1,662,797 | 1,736,275 |
| Student Services | 475,094 | 492,381 |
| Institutional Support | 3,131,835 | 3,287,675 |
| from general fund | 7,981,109 | 8,411,235 |
| from earmarked revenue funds: | | |
| student fees account | 3,560,000 | 3,560,000 |
| university mill. account | 2,225,518 | 2,365,373 |
| from other treasury funds | 556,115 | 570,615 |

As you have indicated to me, the real thrust of your inquiry is whether the legislature may appropriate moneys to the university system by program and restrict the transfer of those moneys between separate programs, as well as separate units of the university system. This question arises due to the rather broad language contained in Article X, section 9, Constitution of Montana (1972), which provides, in part:

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have **full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system...** (Emphasis supplied)

Does the "full power, responsibility and authority" granted the board of regents preempt the legislature's authority to line-item appropriations by programs and attach conditions thereto? As far as House Bill 55 is concerned, absolutely not.

Montana's Constitution, Article III, section 1 (1972), divides the "power of the government" into three distinct branches — legislative, executive, and judicial. The Montana Supreme Court has consistently held that the power of the legislature is plenary, except as limited by the United States Constitution, the treaties made, and statutes enacted pursuant thereof, and by the Constitution of Montana. **Goodell v. Judith Basin County, et al.**, 79 Mont. 222, 224 P. 1110 (1924), **State ex rel. Evans v. Stewart, et al.**, 53 Mont. 18, 161 P. 309 (1916).

Furthermore, the power of the legislature will not be deemed to be circumscribed by mere implication. **Goodell**, supra, at 228.

He who seeks to limit the power of the lawmakers must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms. **Evans**, supra, at 25.

And so it is with the problem at hand. If the legislature's power and authority to appropriate state moneys by program and line-item and to attach conditions on the expenditure of those funds has been preempted, then such a limitation must appear in no uncertain terms in Montana's Constitution. No such specific limitation appears in the Education and Public Lands article of the Constitution.

Other jurisdictions have entertained similar and related questions. The state of Michigan is regarded by some authorities in the field of higher education to have a board of regents with the most extensive powers and authority of any such board in the United States. L. Glenny and T. Dalglish, **Public Universities, State Agencies, and the Law: Constitutional Autonomy in Decline** (1973). Yet, even Michigan has affirmed the authority of the legislature over appropriations.

The legislature may put certain conditions on money it appropriates for the University which are binding if the Regents accept the money. **Sprik v. Regents of University of Michigan**, 204 N.W.2d 62, 67 (Mich. 1972)

Absent an intrusion into those areas which distinctly and uniquely belong under the jurisdiction of the Regents, line-item appropriations and conditions attached thereto such as those contained in House Bill 55 are constitutionally permissible. By this holding, not only is the separation of powers principle preserved, but also the duty of the legislature to strictly account for all moneys spent by the state is secured.

THEREFORE, IT IS MY OPINION:

1. The provisions of sections 79-308 and 82A-204, R.C.M. 1947, relating to the investment of state moneys are applicable to the board of regents of higher education and the separate units of the Montana university system.
2. The provisions of section 59-1001, et seq., R.C.M. 1947, relating to employee benefits and vacation leave are applicable to employees of the separate units of the Montana university system except those persons who would qualify as "school teachers" under the provisions of section 59-1007, R.C.M. 1947.
3. The provisions of section 79-306, R.C.M. 1947, designating the state treasurer as the treasurer of every state agency and institution and requiring the daily deposit of all moneys, credits, evidences of indebtedness, and securities, either in financial institutions designated by the state treasurer or with the state treasurer, are applicable to the board of regents and the separate units of the Montana university system and the public funds under their control and supervision.
4. The line-item appropriations and conditions attached thereto contained in House Bill 55, Montana Session Laws of 1973, are constitutionally permissible and binding on the board of regents of higher education and the separate units of the Montana university system.

Very truly yours,
ROBERT L. WOODAHL
Attorney General