

**VOLUME NO. 36****Opinion No. 76**

**APPROPRIATIONS — Earmarked funds, specific purposes; BOARD OF REGENTS — Constitutional power; MONTANA UNIVERSITY SYSTEM — Earmarked revenue carry over; House Bill 55, Forty-third Legislative Assembly, 1973; House Bill 271, Forty-fourth Legislative Assembly, 1975 — Regular Session; House Bill 1, Forty-fourth Legislative Assembly, 1975 — Special Session; Article X, section 9, 1972 Montana Constitution; Sections 79-601, 79-1015.3, 82-109 Revised Codes of Montana 1947.**

**HELD:** The university system must carry over the balances in the following nongeneral fund accounts (earmarked revenue, private income, land grant income, Agriculture Experiment Station income, and Federal income) from the 1973-1975 biennium to the respective funds in the 1975-1977 biennium. The Board of Regents may expend these funds by approved budget amendment.

May 7, 1976

Lawrence K. Pettit, Ph.D.  
Commissioner of Higher Education  
The Montana University System  
1231 11th Avenue  
Helena, Montana 59601

Dear Dr. Pettit:

You have requested my opinion on the following questions:

1. Whether the University System (which is financed by both appropriations from the general fund as well as appropriations from earmarked revenue) may carry over earmarked revenue balances (student fees) from the 1973-75 biennium for expenditure by approved budget amendment during the 1975-77 biennium **or** must all earmarked revenue balances (student fees) remaining from the 1973-75 biennium be used to reduce general fund expenditures made during the 1973-75 biennium?
2. Whether the University System may carry over private income and land grant interest income from the 1973-75 biennium for expenditure by approved budget amendment during the 1975-77 biennium **or** must

all private income and land grant interest income balances remaining from the 1973-75 biennium be used to reduce general fund expenditures made during the 1973-75 biennium?

3. Whether the University System may carry over income funds of the agricultural experiment station from the 1973-75 biennium for expenditure by approved budget amendment during the 1975-77 biennium **or** must all agricultural experiment income balances remaining from the 1973-75 biennium be used to reduce general fund expenditures made during the 1973-75 biennium?

4. Whether the University System may carry over Federal income from the 1973-75 biennium for expenditure by approved budget amendment during the 1975-77 biennium **or** must all Federal income balances remaining from the 1973-75 biennium be used to reduce general fund expenditures made during the 1973-75 biennium?

The factual situation that prompted your opinion request appear to be as follows: The first regular session of the Forty-third Legislative Assembly, which was in session from January 1, 1973, to March 10, 1973, enacted House Bill 55. This bill appropriated moneys to various state agencies for the biennium ending June 30, 1975. The state agencies included the University of Montana, Montana State University, Eastern Montana College, Western Montana College, Northern Montana College, Cooperative Extension Service, and the Agricultural Experiment Station.

All of the agencies noted above were appropriated funds by House Bill 55 from both the state general fund and from earmarked revenue accounts. Some of these agencies received additional funds during the biennium from the Federal Government, private donations, and interest, rents and royalties from state lands. The earmarked revenue accounts are funded primarily from student tuition fees, and, in the case of the Agricultural Experimental Station, from the sale of livestock and agricultural products.

House Bill 55 contained the following conditions and limitations on the expenditure of general moneys:

Section 8. If the operation of a state agency is financed by an appropriation or appropriations from the general fund as well as by appropriation from other sources, the funds provided by appropriation from the general fund shall be decreased by the amount that the funds received from other sources exceeds the amount from other sources appropriated by the legislature in the 1975 biennial budget, provided that:

(1) the decrease does not jeopardize the receipt of the funds to be received from other sources; and

(2) this section shall not apply to any excess funds if they are to be expended for a new or expanded program approved by the governor, or his designated representative upon a request submitted to him through the budget bureau.

Section 11. In addition to the amounts specifically appropriated by this act, there is hereby appropriated to the Montana university system units all federal funds for existing programs, and those funds related to various supporting facilities and organizations such as auxiliary enterprises. All other moneys received from all other sources may be made available by an approved budget amendment.

Section 14. The provisions set forth in this section are limitations on the appropriations made in this act, provided, however, that these limitations do not apply to the distribution of public funds under the superintendent of public instruction. 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) ...

(2) ...

(3) All expenditures of funds appropriated by this act shall be made in accordance with the provisions of section 82-109, R.C.M. 1947, which specifies that expenditures shall be applied against nongeneral fund moneys before general fund moneys.

At the close of the biennium ending June 30, 1975, five of the units of the Montana university system had funds remaining in their respective earmarked revenue accounts. These balances were derived in part from unanticipated increases in enrollment and an increase in tuition fees charged. The balances in the income accounts referred to in questions 2, 3, and 4 were the result of additional unanticipated income from the various sources. These balances were not used to offset expenditures from the general fund as required by section 8, House Bill 55, nor were they expended prior to expending the general fund appropriation as required by section 14(3), House Bill 55.

When the Forty-fourth Legislative Assembly convened in January of 1975, it enacted House Bill 271, which was an act appropriating moneys to the Board of Regents for the university system for the biennium ending June 30, 1977. House Bill 271 contains an offset provision and a spending priority provision similar to those contained in House Bill 55. In addition, however, House Bill 271 makes the expenditure of the appropriations contingent upon the Board of Regents certifying that they will comply with several specific conditions, including the spending priority provision.

On August 4, 1975 the Forty-fourth Legislature convened again in a special session and enacted House Bill 1, which was an act amending various appropriation bills that had been previously enacted during the 1975 regular session. Section 3 of this bill amended House Bill 271 as follows:

Section 3. House Bill No. 271, Laws of Montana 1975, is amended by adding a new section to read as follows:

Section 13. In addition to the appropriations contained in this act, all other monies received from sources other than the general fund and which were not available for consideration by the legislature are hereby appropriated. Such monies may be made available for expenditure only by a budget amendment approved by the legislative finance committee.

Audits of various units of the university system disclosed funds in the earmarked revenue and income accounts which had been earned and received in the 1973-1975 biennium and carried over to the 1975-1977 biennium. These were unanticipated nongeneral funds which were not used to offset the general fund, nor were they expended prior to expenditure of the general fund appropriation.

Upon a cursory examination, it appears that the university system has violated sections 8 and 14(3) of House Bill 55. Section 8 was apparently violated when the university system failed to cause an offset in the general fund appropriation when they received additional nongeneral fund moneys. Section 14(3) was apparently violated when general fund moneys were expended prior to expending these additional nongeneral fund moneys. Further discussion of the problem necessitates a closer examination of sections 8 and 14(3) of House Bill 55 and of the status of the Montana university system.

Since the 1972 Montana Constitution became effective, the Montana University system has enjoyed a unique status in the hierarchy of state government. This status consists of a constitutional independence which has recently been further delineated in Montana Supreme Court cases of **State ex rel. Judge v. Legislative Finance Committee**, ——— Mont. ———, 543 P.2d 1317 (1975) and **Board of Regents of Higher Education v. Judge**, ——— Mont. ———, 543 P.2d 1323 (1975).

The court in **Legislative Finance Committee**, *supra* at 1321, recognized that the Legislature has the power to appropriate and that non general funds are public operating funds subject to the appropriation process. Article X, section 9(2) of the 1972 Montana Constitution, however, grants the Board of Regents:

...full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system...

In discussing the constitutional powers involved, the court in **Board of Regents**, *supra* at 1330, 1332 stated:

Our task then is to harmonize in a practical manner the constitutional power of the Legislature to appropriate with the constitutional power of the Regents to supervise, coordinate, manage and control the university system.

We recognize here that while Montana's Constitution is not as explicit or broad as that of Michigan, the principle of regent independence was definitely intended by the drafters of the 1972 Montana Constitution. At the same time, just as in Michigan, legislative control of higher education through the appropriation process remains.

Basically, section 8 of House Bill 55 provides that additional nongeneral fund revenue and income will result in a corresponding offset in the general fund appropriation. The effect of this is to give the legislature a power beyond that of appropriation. For example, if the Board of Regents were to raise fees at a unit of the university system to cover increased expenses, the additional revenue generated would be offset by a reduction in the general fund appropriation. As a net result, the unit would be in the same financial condition as they were before the fee increase. The Regents' attempt to effectively and responsibly manage the internal fiscal affairs of the university system would be for naught.

In **Regents of the University of Michigan v. State**, 208 N.W. 2d 871 (Mich. 1973), a case cited with approval in **Board of Regents, supra**, the Michigan Court of Appeals addressed itself to a similar statute which had the same effect as section 8, House Bill 55. The Michigan statute imposed conditions and limitations on appropriations granted by the Legislature to the Michigan Board of Regents as follows:

Section 26. If revenue from tuition and student fees ... exceeds in the aggregate the amount reported by the institutions of higher education in their notification of April 15, 1971 for Michigan resident students as a result of an increase in student fees or tuition the general fund subsidy appropriated for the support of that branch or institution of higher education shall automatically be reduced by the amount by which such revenue exceeds the amount reported. Mich. Pub. Acts 1971, No. 122, §26.

Quoting the trial judge in the court below, the Michigan Court of Appeals noted that:

Section 26 provides that the general appropriation will automatically be reduced by an amount equal to any monies received by plaintiffs as a result of an increase in student fees or tuition above that reported on April 15, 1971. The effect of such a provision is to prohibit the plaintiffs from increasing their revenues by increasing tuition rates and student fees, because any increase by the plaintiffs will automatically result in an equal decrease in funds already appropriated.

The lower court then concluded:

Since the Legislature could not directly prohibit plaintiffs from increasing their tuition rates or student fees, it cannot do so indirectly by deducting any increases from the funds appropriated to the plaintiffs. Further, as was previously stated, once the legislature makes a general appropriation to plaintiffs it becomes the property of the plaintiffs and passes beyond the control of the legislature.

The court, therefore, holds that portion of section 26 which automatically reduces the appropriation to be unconstitutional in violation of Const. 1963, art. 8, §5.

It is obvious that if section 8 of House Bill 55 is enforced, it will have the same effect on the units of the Montana University System as section 26 had on

the University of Michigan. The Legislature would be doing indirectly what it cannot do directly, that is, to establish tuition rates for the university system. In **Board of Regents, supra** at 1333, the Montana Supreme Court stated that ...the legislature cannot do indirectly through the means of line item appropriations and conditions what is impermissible for it to do directly. If section 8 were brought before a court of competent jurisdiction in Montana on a constitutional challenge, it is obvious that it would suffer the same fate as did section 26 before the Michigan court. For this reason, section 8 is not an effective provision to rely on to require an offset of unanticipated nongeneral funds to the general fund in this case.

Inasmuch as it has been determined that section 8 of House Bill 55 is not enforceable in this instance, the university system was under no obligation to offset additional earmarked revenue by decreasing the general fund appropriation. It should be noted that the provisions of section 8 do not apply to the funds mentioned in questions 2, 3 and 4, and therefore these funds were not discussed in depth.

In regard to the Federal income involved, section 11 of House Bill 55 appropriated "all federal funds for existing program." All federal funds that were received were appropriated and the offset provisions of section 8 would not apply. Similarly, income from all land grants is annually and perpetually appropriated by section 79-601, R.C.M. 1947. The private income referred to in question 2 is also unaffected by section 8 since the court in **Board of Regents, supra** at 1331, made it clear that the legislature had no control over private moneys.

The income carry over from the Agricultural Experiment Station is also not affected by section 8 of House Bill 55. The Experiment Station more closely resembles a large-scale research ranch than a typical unit of the university system. Due to this uniqueness, the Station has traditionally carried over funds from one biennium to the next. Practically speaking, management of a ranch operation of this scale would be inefficient if the Station were required to spend available funds down to zero at the end of each biennium, or risk losing them to the general fund. It has also been held that income from the Agricultural Experiment Station is derived and created for special purposes which may not be diverted and co-mingled with the general fund. 19 **Opinions of the Attorney General**, No. 231 at 371.

With the offset provision either being inapplicable or unenforceable as to the funds in question, it is evident that the only remaining section that may have been violated by university system personnel is section 14(3) of House Bill 55.

Section 14(3) of House Bill 55 refers to section 82-109, R.C.M. 1947 which reads, in part, as follows:

- (2) The department (of Administration) shall apply expenditures against nongeneral fund moneys wherever possible before using the general fund appropriation.

Section 82-109, *supra*, appears to be a managerial device to facilitate the accountability of appropriated funds. If the provisions of section 14(3) of House Bill 55 were violated, thereby violating section 82-109, *supra*, what recourse or remedy is available? Neither Chapter 1, Title 82, R.C.M. 1947, nor House Bill 55 contain any enforcement provisions. It is interesting to note that the Legislature in 1975, recognizing this shortcoming in House Bill 55, included a certification provision in House Bill 271 for the 1975-1977 biennium.

At this juncture, there appears to be two possible remedies available for the violation of sections 14(3), House Bill 55, and section 83-109, *supra*. (1) The Funds in question could be used to offset the current general fund appropriation, or (2) the funds should remain with the university system with the responsible personnel subject to appropriate measures.

Although using the funds in question to offset this biennium's general fund appropriation may appear to be the equitable approach, this method is not legally available. If the university system were required to offset this biennium's general fund appropriation by the amount of the carried over funds, the identical objections which invalidated section 8 of House Bill 55 would arise. If the offset were allowed, the Legislature would be overstepping their constitutional power to appropriate and would, in effect, be setting the amount charged for tuition and fees. This, of course, would infringe on the Regents' constitutional power to manage the university system.

A further obstacle to an offset in the general fund arises out of the nature of the nongeneral funds involved. These funds are in earmarked revenue and income accounts — that is they may only be spent for specific purposes within the university system. This restriction is based on Article X, section 11 of the 1972 Montana Constitution which reads as follows:

The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by the state against loss or diversion. The interest from such invested funds, together with the rent from leased lands or properties, shall be devoted to the maintenance and perpetuation of the respective institutions.

This restriction is further supported by the provisions of Chapter 86, Title 75, R.C.M. 1947, dealing with university finance. If an offset were allowed, these funds, which were generated from students or other sources for the support of the university system would effectively be lost. A corresponding amount of the general fund appropriation would revert back to the general fund. While the actual funds carried over would remain in the university system, an amount representing these earmarked moneys would be lost. For all manner and purposes, therefore, the effect is as if the earmarked moneys were placed in the general fund, which is in violation of Article X, section 11 of the 1972 Constitution.

This position is also supported by **State ex rel. Browning v. Brandjord**, 106 Mont. 395, 81 P.2d 677 (1938), wherein the Montana Supreme Court construed the provisions of section 340, R.C.M. 1921, which now appears as section 79-1015.3, R.C.M. 1947, and provides:

All moneys appropriated for any specific purpose shall after the expiration of the time for which so appropriated, **revert to the several funds and accounts from which originally appropriated.** However, any unexpended balance in any specific appropriation may be used for the years for which the appropriation was made. (Emphasis supplied)

The Montana Supreme Court held that an unexpended portion of an appropriation remaining at the end of a biennium "reverts to the fund from which it is set apart." **State ex rel. Browning, supra** at 400.

There remains, therefore, only the second alternative which is to allow the university system to retain the funds involved. The fact that section 14(3), House Bill 55, and section 82-109, **supra**, were violated is evident. The only available recourse, however, is for the Board of Regents to investigate the circumstances surrounding the violations and take appropriate action.

**THEREFORE, IT IS MY OPINION:**

The university system must carry over the balances in the following nongeneral funds accounts (earmarked revenue, private income, land grant income, Agriculture Experiment Station income, and Federal income) from the 1973-1975 biennium to the respective funds in the 1975-1977 biennium. The Board of Regents may expend these funds by approved budget amendment.

Very truly yours,

**ROBERT L. WOODAHL**  
Attorney General