VOLUME NO. 37 OPINION NO. 165

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION - Grants to religious organizations; PUBLIC FUNDS - Grants to religious organizations; RELIGIOUS ORGANIZATIONS - Alternative renewable energy source grants; MONTANA CONSTITUTION - Article II, section 5; Article X, section 6; REVISED CODES OF MONTANA, 1947 - Sections 84-7407 to 84-7413; ADMINISTRATIVE RULES OF MONTANA - 36-2.8(18)-S8060 to S8170.

HELD: The Department of Natural Resources and Conservation may not award alternative renewable energy source grants to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. If a religious organization that does not fall into any of these categories applies for a grant, the department may award the grant if it determines that:

(1) a substantial portion of the organization's functions are secular rather than religious, and

(2) the grant will be used for a secular rather than religious function.

25 October 1978

Donald MacIntyre
Chief Legal Counsel
Department of Natural
Resources & Conservation
32 South Ewing
Helena, Montana 59601

Dear Mr. MacIntyre:

You have requested an opinion concerning the constitutionality of granting money to religious organizations for the research, development or demonstration of alternative renewable energy sources.

Pursuant to section 84-7411, R.C.M. 1947, any person may apply for a grant to enable him to research, develop, or demonstrate alternative renewable energy sources. A person is defined as any natural person, corporation, partnership or other business entity, association, trust, foundation, any educational or scientific institution or any governmental unit. Section 84-7408(2), R.C.M. 1947. To the extent constitutionally permitted, a religious organization may qualify as a person and apply for an ARES grant through the Department of Natural Resources and Conservation. The grants awarded by the department are paid by the state treasurer by warrants payable from the alternative energy research development and demonstration account within the earmarked revenue fund. Section 84-7409, R.C.M. 1947.

My opinion is that ARES grants to religious organizations are prohibited by both Article II, section 5 and Article X, section 6 of the Montana Constitution. Article II, section 5 provides:

> The state shall make no law respecting an establishment of religion ....

This language is taken directly from the Establishment Clause contained in the First Amendment of the United States Constitution. The United States Supreme Court, in Wolman v. Walter, 97 S.Ct. 2593, 2599 (1977), said:

> The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or

> primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

Granting money under the ARES program has a secular purpose. The ARES grants are intended to stimulate research, development and demonstration of energy sources which are harmonious with ecological stability by virtue of being renewable. Section 84-7407, R.C.M. 1947. "But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." Committee for Public Education v. Nyquist, 413 U.S. 756, 774 (1973).

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743 (1973).

Nyquist involved a state statute authorizing direct payments to certain nonpublic elementary and secondary schools, virtually all of which were church related to be used for the "maintenance and repair of ... school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." 413 U.S. at 762. The United States Supreme Court ruled that although the legislative purpose was secular, the provision was unconstitutional, and gave this explanation:

> The grants ... are given largely without restriction on usage. ...[I]t is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in this statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which

> primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

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> religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

Id. at 774.

The Supreme Court's reasoning applies also to Montana's ARES grants. Nothing in the statutes, sections 84-7407--7413, R.C.M. 1947, nor in the department's guidelines for implementation of the law, ARM 36-2.8(18)-S8060--S8170, restricts the use of such grants to projects involving facilities used exclusively for secular functions, nor would it be possible to impose such restrictions within the context of organizations, a substantial portion of whose functions are subsumed in the religious mission. The department may not, therefore, award an ARES grant to such religious organizations.

The United States Supreme Court has, however, recognized that some religious organizations perform functions that are secular in nature, and that are clearly distinguishable from the organization's religious functions. Aid to those organizations that is restricted to use in connection with secular functions only does not violate the Establishment Clause. For example, in Hunt v. McNair, supra, the Court approved a law authorizing the issuance of revenue bonds to benefit a Baptist-controlled college. The college's operations were not oriented significantly towards religious rather than secular education. And the law specifically disallowed the financing of any project encompassing:

> [A]ny facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination. S.C. Code Ann. section 22-41.2(b) (Supp. 1971).

413 U.S. at 736-37.

Under Article II, section 5, then, grants may not be awarded to any religious organization unless a substantial portion

> religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

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Under Article II, section 5, then, grants may not be awarded to any religious organization unless a substantial portion

of its functions are secular, and the grant is to be used for one of those secular functions. This means, for example, that a grant may not be used to heat a building that is used for religious meetings.

When the religious organization is a church or a school, academy, seminary, college, university, or other literary or scientific institution that is controlled in whole or in part by any church, sect, or denomination, the constitutional prohibition is even clearer. Under Article X, section 6(1) of the Montana Constitution, those organizations may not be awarded ARES grants regardless of whether religion permeates the organization or whether the grant's intended use is purely secular.

Article X, section 6(1) states:

> The legislature ... shall not make any direct or indirect appropriation or payment from any public fund or monies ... for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination. (Emphasis added.)

The Montana Supreme Court has not discussed the scope of this provision in detail. I have, therefore, looked for guidance in reaching this conclusion to other states with similar constitutional provisions, see Yellowstone Pipeline Co. v. State Board of Equalization, 138 Mont. 603, 358 P.2d 55 (1960), and to the intent of the framers of our own constitution as reflected in the constitutional convention proceedings, see Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976); School District No. 12 Phillips County v. Hughes, 170 Mont. 267, 552 P.2d 328 (1976).

The Idaho Supreme Court discussed the nature of a constitutional provision almost identical to Article X, section 6 in Epeldi v. Engelking, 94 Ida. 390, 488 P.2d 860 (1971). The Idaho court was concerned with aid to parochial schools in the form of transportation of students by district school buses. Epeldi, concluding that the aid was unconstitutional, held that the framers of the Idaho constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for that particular provision, because the Idaho Constitution already contained language comparable to the Establishment Clause of the First Amendment of the

United States Constitution. The test applied was whether the legislation involved would be in aid of and whether it would help support or sustain any church affiliated school. The Court stated:

> The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute ... whether the legislation has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."

488 P.2d at 865.

Other jurisdictions in accord with Idaho are Nebraska and South Dakota. See Gaffney v. State Department of Education, 192 Neb. 358, 220 N.W.2d 550 (1974); McDonald v. School Board of Yankton, 246 N.W.2d 93 (1976).

The Montana Constitutional Convention Committee Report on Article X, section 6, at 20, shows the intent of the Montana framers to be identical to the holding in Epeldi:

> Although the Montana provision is more stringently prohibitive than is the federal First Amendment and provisions in some other states, this is within a state's prerogative. A state may prohibit forms of state aid which might be permissible under federal Supreme Court rulings.

Under Article X, section 6, then, the question is not whether the grant funds a religious activity, or whether religion permeates the organization being awarded the grant. Rather, the question is whether the grant aids the church or institution to whom it is awarded. It is clear that a grant would aid those organizations financially; the grant frees up funds that otherwise would have been used to carry out the program for which the grant is made. Thus, for example, a grant to a sectarian college for heating a swimming pool by adapting solar technology would aid that institution even though the activity being funded is not religious, and even though a substantial portion of the college's functions are not subsumed in the religious mission. Such a grant would, nonetheless, be prohibited by Article X, section 6.

THEREFORE, IT IS MY OPINION:

The Department of Natural Resources and Conservation may not award alternative renewable energy source grants to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. If a religious organization that does not fall into any of these categories applies for a grant, the department may award the grant if it determines that:

(1) a substantial portion of the organizations functions are secular rather than religious, and

(2) the grant will be used for a secular rather than religious function.

Very truly yours,

MIKE GREELY
Attorney General