

VOLUME NO. 40

OPINION NO. 67

APPROPRIATIONS - Funds pledged as security for university revenue bond obligations;  
BOARD OF REGENTS - Authority over funds pledged as security for university revenue bond obligations;  
MONTANA CODE ANNOTATED - Sections 20-25-301, 20-25-302, 20-25-401 to 20-25-403;  
MONTANA CONSTITUTION - Article II, section 31; article X, section 9(2)(a), (d).

HELD: The Legislature may not appropriate, by bill, revenue generated from sources pledged to cover university system revenue bond requirements, when the revenue obtained from these sources exceeds the bond requirements.

18 September 1984

Judy Rippingale  
Legislative Fiscal Analyst  
State Capitol  
Helena MT 59620

Dear Ms. Rippingale:

You have asked my opinion on the following questions:

1. May the Legislature appropriate, by bill, revenue generated from sources pledged to cover university system revenue bond requirements, when the revenue generated from these sources exceeds the bond requirements?
2. If so, must the "excess revenue" be appropriated for a particular purpose?

For reasons I have outlined below, I conclude that the Legislature does not have the authority to make such appropriations; consequently I do not find it necessary to reach your second question.

The Board of Regents (frequently referred to hereinafter as "the Regents") is given specific statutory authority to issue bonds. § 20-25-402(3), MCA. Debts created by these bonds are not charged against the State as general obligations. § 20-25-403, MCA. The Board of Regents may pledge various sources of university system income (rather than tax revenues) as security for the bonds it issues. Pursuant to section 20-25-402(4), MCA, the Board may:

(4) pledge for the payment of the ... principal and interest on bonds, notes, or other securities authorized in this chapter or otherwise obligate:

(a) the net income received from rents, board, or both in housing, food service, and other facilities;

(b) receipts from student building, activity, union, and other special fees prescribed by the regents for all students; and

(c) other income in the form of gifts, bequests, contributions, federal grants of funds, including the proceeds or income from grants of lands or other real or personal property; receipts from athletic and other contests, exhibitions, and performances; and collections of admissions and other charges for the use of facilities, including all use

by other persons, firms, and corporations for athletic and other contests, exhibitions, and performances and for the conduct of their business, educational, or governmental functions.

Your question concerns whether the State Legislature may appropriate some or all of the funds from these pledged sources whenever the income generated from them exceeds the bond obligations such as payment of principal and income. Since your request concerns the effect of future and therefore hypothetical legislative action, this opinion is advisory in nature.

The Board of Regents is given broad authority to manage the university system's sources of revenue. Section 20-25-301(9), MCA, gives the Regents "general control of all receipts and disbursements of the system." Section 20-25-302, MCA, expressly grants the Regents the power to purchase, construct, equip, or improve land, buildings, and other facilities and to devote the revenues from the operation of these facilities, including any fees collected therefrom, to debt service and reserves, "so far as such revenues have not been previously obligated for the purposes." § 20-25-302(3), MCA. Section 20-25-401, MCA, authorizes the Regents to establish and collect student building fees and pledge the receipts to various uses such as the acquisition and construction of recreation facilities, or for principal and interest payable on revenue bonds issued to finance such facilities. Finally, the Regents are authorized by law to use bond revenues to refund or retire outstanding bonds. § 20-25-402(7), MCA. For these purposes the statute specifically permits the Regents to use

revenues or other funds on hand, in excess of the amount pledged by resolutions or indentures authorizing outstanding bonds.... Revenues and other funds on hand, including reserves pledged for the payment and security of outstanding revenue bonds, may be ... invested and disbursed as provided in subsection 7(c) hereof to the extent consistent with the resolutions or indentures authorizing such outstanding bonds.

§ 20-25-402(7) (d), MCA.

The terms of the bonds are also instructive. The indenture provisions which you attached to your opinion request include language concerning how the funds in the various bond reserve accounts may be used. For example, section 5.04 of a 1965 Eastern Montana College indenture calls for the creation of a "Revenue Fund" for the purpose of covering current expenses associated with the bond project. The balance of the Revenue Fund must be used to complete the deposit in the "Revenue Bond Fund" and to restore any deficiencies therein. "[T]he Regents may use any remaining balance in the Revenue Fund not needed for current expenses and payable" to redeem outstanding bonds, acquire or improve facilities, or "for any other purpose for which the funds pertaining to the College may lawfully be expended." Section 4.03 of a 1971 Montana State University indenture provides for revenue derived from the bond project to be deposited in a "Bond Account" to be used for payment of principal and interest. Excess funds are placed in a "Reserve Account," the use of which is within the Regents' discretion. Pursuant to section 4.04, the "Reserve Account" funds are also to be used to make up any deficiencies that may arise in the "Bond Account."

I have cited the aforementioned statutory and indenture provisions in order to emphasize the broad legal responsibility given to the Board of Regents with respect to the use of the university system's income, as well as the Regents' contractual obligations, which may not be impaired by state law. Mont. Const. art. II, § 31. Were the Legislature to appropriate those funds from pledged sources that are "in excess" of the amount necessary to cover bond requirements (assuming it would be possible to determine this amount), the practical effect would be to eliminate the Regents' authority to use pledged revenue in the variety of ways set forth in the law. The options given the Regents in expending pledged revenues, e.g., to redeem revenue bonds, or to improve university facilities, would be meaningless if the funds to be used were always unavailable because they had been appropriated by the Legislature.

Moreover, the terms of the bonds which require that certain amounts of funds be maintained in reserve accounts contemplate that a minimum of funds be kept in reserve. It is entirely possible that responsible fiscal management would necessitate an increased reserve at some future time. If the Regents are foreclosed this

option because the "excess" pledged revenue is appropriated by the Legislature for other purposes, then the actions of the Legislature would prevent the Regents from exercising duties which the Legislature has imposed upon them by statute. The possible need for an increased reserve also suggests that it may never be possible to precisely calculate the amount of any "excess" pledged funds.

Additional support for my conclusion is found in the case law. The Board of Regents' powers over the financial affairs of the university system were addressed in Board of Regents of Higher Education v. Judge, 168 Mont. 433 at 446, 543 P.2d 1323 at 1331, 1334 (1975), wherein the Court emphasized that the Legislature's power to appropriate does not extend to private funds received by state government which are restricted by law, trust agreement, or contract. Since these types of funds may be pledged by the Regents as security for revenue bonds pursuant to section 20-25-402(4), MCA, the above-cited portion of the Court's opinion in Board of Regents is relevant to your question. So also is the decision in State ex rel. Veeder v. State Board of Education, 97 Mont. 121, 133, 33 P.2d 516, 521-22 (1934), in which the Court, interpreting statutes currently in effect, found that the Regents' predecessor, the State Board of Education, had express power to manage and control the business and finances of the university system and had implied power to do all things necessary and proper to the exercise of those general powers. See § 20-25-301(8) and (9), MCA. See also State ex rel. Blume v. State Board of Education, 97 Mont. 371, 378-79, 34 P.2d 515, 518-19 (1934) (the State Board of Education was vested with exclusive power to receive and control the funds derived from land grants). At the heart of the Court's decisions are the provisions of the 1972 Montana Constitution and its 1889 predecessor, concerning the Board of Regents' general control over the university system. Article X, section 9(2)(a) and (d) of the 1972 Constitution provides:

(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.

In summary, the statutes and the terms of the bonds themselves give the Board of Regents control over the use of the sources of income that are pledged as security for university system revenue bonds, regardless of whether the income "exceeds" the bond obligations. Appropriation of these funds by the Legislature would contravene the legal authority to control the funds that is vested in the Board of Regents.

THEREFORE, IT IS MY OPINION:

The Legislature may not appropriate, by bill, revenue generated from sources pledged to cover university system revenue bond requirements, when the revenue obtained from these sources exceeds the bond requirements.

Very truly yours,

MIKE GREELY  
Attorney General