

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 123

APPROPRIATIONS - Use of budget amendment process and interaccount loan provisions where the only anticipated

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revenue is the possibility of a supplemental appropriation;

APPROPRIATIONS - Use of statutory appropriation provided for in section 10-3-312, MCA, and other funds to pay costs associated with a disaster;

BUDGET AMENDMENTS - Use of budget amendment process where the only anticipated revenue is the possibility of a supplemental appropriation;

DISASTER AND EMERGENCY SERVICES - Use of statutory appropriation provided for in section 10-3-312, MCA, and other funds to pay costs associated with a disaster;

STATE AGENCIES - Use of budget amendment process and interaccount loan provisions where the only anticipated revenue is the possibility of a supplemental appropriation;

MONTANA CODE ANNOTATED - Sections 5-12-102(1), 10-3-104(3), 10-3-111, 10-3-207 (Article V), 10-3-302, 10-3-303(1), 10-3-311, 10-3-312, 10-3-314, 10-3-405, 17-2-107, 17-2-107(2), 17-7-401(4), 17-7-402, 17-7-403.

- HELD: 1. A disaster or emergency must be declared by the Governor before expenses may be incurred under section 10-3-312, MCA.
2. If a disaster is declared by the Governor under Title 10, chapter 3, MCA, the \$1 million statutory appropriation provided for in section 10-3-312, MCA, need not be expended before any other funds may be used for expenses associated with the disaster.
3. The budget amendment process was not intended to permit a loan from the state's general fund, where the only anticipated revenue for repayment is the possibility of a subsequent appropriation of funds from the general fund.
4. Reliance on the possibility of a supplemental appropriation sometime in the future does not meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

15 November 1988

Speaker Bob Marks
Montana House of Representatives
302 Lump Gulch
Clancy MT 59634

Dear Speaker Marks:

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I have received your request for an opinion on the following questions:

1. What are the requirements for incurring liabilities under the disaster and emergency laws contained in Title 10, chapter 3, MCA? Specifically, must a disaster proclamation be issued before the state can incur those liabilities?
2. If a disaster is proclaimed, must the \$1 million appropriated in section 10-3-312, MCA, be expended toward the payment of those liabilities before any funds, other than those provided through section 10-3-201, MCA, are used for that purpose?
3. May a budget be amended under Title 17, chapter 7, part 4, MCA, when the funds to be used for the amendment are to be supplied by the general fund?
 - A. If the general fund can finance such a budget amendment, may unappropriated moneys in the general fund be so used?
 - B. Is there any other authority for such a budget amendment?
4. Under section 17-2-107, MCA, or any other authority, may an interaccount loan be made to provide interim moneys for a special revenue account when there is no anticipated income which would be sufficient to repay the loan as required by section 17-2-107(2), MCA, other than the possibility of a supplemental appropriation by the next Legislature?

Your inquiry arises from the occurrence of widespread forest fires throughout the state this past summer. Your specific questions relate to the procedures followed by the Governor in paying the state's share of costs (approximately \$11.4 million) associated with the suppression of those fires. Although the validity of the expenses does not seem to be in dispute, your opinion request mentions the possible need for amending the statutes relied upon by the Governor.

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I. DISASTER AND EMERGENCY SERVICES STATUTES.

Your first and second questions concern Title 10, chapter 3, MCA, which establishes the state's authority for providing disaster and emergency services. The answer to your first question as to when the state incurs liability under the disaster and emergency statutes depends upon what you mean by the term "liability." If you are referring to the incurring of expenses, the conditions set forth in section 10-3-311, MCA, must first be met, including a declaration by the Governor of a disaster or emergency. § 10-3-311(1), MCA.^{2/} If, however, your use of the term "liability" includes the broad subject areas of tort and contract law, the question is inappropriate for an Attorney General's Opinion. It has been my policy to leave to the courts the determination of when and to what extent a party incurs civil liability, since such a determination depends upon extensive factual findings. I note that section 10-3-111, MCA, specifically addresses the state's immunity from tort liability during a disaster or catastrophe. See also § 10-3-207, MCA, at Article V.

Your second question involves section 10-3-312, MCA, which also requires, according to the plain language of the statute, that an emergency or disaster be declared by the Governor before expenditures may be made pursuant to this statutory appropriation. That statute provides:

Maximum expenditure in biennium. Whenever an emergency or disaster is declared by the governor, there is statutorily appropriated to the office of the governor, as provided in 17-7-502, and he is authorized to expend from the general fund, an amount not to exceed \$1 million in any one biennium.

^{2/} See also Minutes of the House Appropriations Committee, March 21, 1983 (the Governor must declare a disaster in order to make money available--comments of Morris Brusett); Minutes of Senate and Claims Committee, April 12, 1983 (after declaring a disaster, it gives [the Governor] the authority to spend [the funds]--comments of Representative Driscoll). Authority for making such declarations is provided in sections 10-3-104(3), 10-3-302, and 10-3-303(1), MCA. I note that in the instant case the Governor did declare that a disaster had occurred in Montana. See Governor's Proclamation dated September 19, 1988.

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You ask whether the \$1 million statutory appropriation provided in section 10-3-312, MCA, must be expended for the costs associated with a disaster before any funds other than those provided in section 10-3-201, MCA, may be used.

There is no requirement in Title 10, chapter 3, MCA, that the funds authorized by the \$1 million statutory appropriation be expended before any other funds may be spent on a disaster or emergency. Indeed, certain provisions in the disaster and emergency services statutes support the opposite conclusion. For example, sections 10-3-314 and 10-3-405, MCA, contemplate that local and federal funds may be used for emergency or disaster-related expenses. Neither of these provisions conditions the use of such funds on the state's first having depleted its \$1 million emergency fund. On the contrary, it was understood by some members of the Legislature that local funds would be used before the state's emergency fund would be tapped. See Minutes of the House State Administration Committee, January 14, 1983, page 2.

II. BUDGET AMENDMENT STATUTES.

Your third question involves the budget amendment statutes, §§ 5-12-401, 5-12-402, 17-7-401 to 405, MCA. While the previously-discussed disaster and emergency statutes authorize spending by the Governor's Office, the budget amendment statutes involve the spending authority of any state agency that does not have funds available for necessary additional services. Some background on the budget amendment statutes is in order.

A "budget amendment" is defined in Title 17, MCA, as

a legislative appropriation to increase spending authority for the special revenue fund, proprietary funds, or unrestricted subfund contingent on total compliance with all budget amendment procedures. [Emphasis added.]

§ 17-7-401(4), MCA. For purposes of the Legislative Finance Act, the definition is somewhat different.

"Budget amendment" means a request submitted through the budget director to the [legislative finance] committee for executive branch agencies to expend funds in excess of those appropriated by the legislature.

§ 5-12-102(1), MCA. The budget amendment statutes, revised and expanded in 1983 (1983 Mont. Laws, ch. 536),

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require that an "appropriation to increase spending authority" be certified by an approving authority and submitted through the Legislative Fiscal Analyst to the Legislative Finance Committee before final approval may be given by the approving authority. The Finance Committee is afforded the opportunity to convey any concerns it may have to the approving authority prior to budget amendment approval.

In brief, these procedures provide for the following: a request for increased spending authority by the "requesting authority" (in this case the Montana Department of State Lands); certification by the approving authority (in this case the Governor) as to the need for the appropriation; review by the Legislative Fiscal Analyst for compliance with the budget amendment requirements and standards; comment by the Legislative Finance Committee; and final approval or denial of the amendment by the approving authority. The Legislative Finance Committee has no authority to approve or deny budget amendments, but may submit comments to the approving authority before the amendment is finally approved. See § 17-7-404(7), MCA; testimony of Representative Marks and Senator Aklestad on House Bill 548, Minutes of the Senate Finance and Claims Committee, March 11, 1983, pages 3 and 7.

The statutes expressly permit the budget amendment process to be used to authorize the spending of money in a special revenue fund for emergency situations. See §§ 17-7-402(1)(c), 17-7-403(3), MCA. However, certain criteria must be met before such a budget amendment may be approved. These criteria prompt your third question of whether the funds for a budget amendment may be supplied from the state's general fund.

Sections 17-7-402(1)(b) and 17-7-403(1)(d), MCA, prohibit the approval of a budget amendment if the amendment makes any "significant ascertainable commitment" for any present or future increased general fund support. This phrase is subject to different interpretations. The only effort to explain it during legislative hearings involved an example of purchasing some calculators for the Montana School for the Deaf and Blind, which would result in an increase in electricity to be paid for by the general fund. Such an insignificant commitment for increased general fund support was deemed permissible. Testimony of Senator Van Valkenburg on House Bill 548, Senate Finance and Claims Committee, March 17, 1983, page 7. It is arguable that even a significant amount of funds for a budget amendment could come from the general fund if the transaction were treated as a loan, to be repaid from

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anticipated revenues due the "borrowing" agency. The basis for such an argument is that the use of general fund monies would be a temporary one, and would thus not run afoul of the "significant ascertainable commitment of increased general fund support" proscription.

Another theory which could be used to avoid problems with the "significant ascertainable commitment of increased general fund support" involves an interpretation of the disaster and emergency services statutes. Although section 10-3-312, MCA, puts a \$1 million ceiling on the statutory appropriation for emergency expenses, section 10-3-311(1), MCA, permits the Governor to authorize the "incurring" of expenses to be paid from the general fund, "in the amount necessary" whenever a disaster is declared. One could argue that once expenses of \$11.4 million were incurred, those expenses became obligations of the general fund under section 10-3-311(1), MCA. Thus, it could be said that at the time the budget amendment certification process began, the general fund was already obligated to pay valid emergency expenses and no additional significant commitment of general fund support would occur at that point. However, the legislative history of the budget amendment process and the facts of the case in question do not support either of these theories.

With respect to this past summer's forest fires, the materials submitted with your opinion request show that the Department of State Lands requested a budget amendment of \$11,465,224 to pay the costs associated with the suppression of the fires. The statutory requirements were certified and submitted to the Legislative Fiscal Analyst. Although the Legislative Finance Committee expressed concerns as to whether the budget amendment process had been properly followed, the Governor approved the amendment. A state special revenue fund account was created to receive \$11,465,224 from the state's general fund. The transaction was intended by the Governor to be treated as a loan from the general fund, to be repaid before April 30, 1989, with funds from a supplemental appropriation. See Inter-entity Loan Authorization, September 22, 1988, signed by Alan Christianson.

The transaction in question, then, could be described as follows: The Montana Department of State Lands borrowed \$11,465,224 from the state's general fund, to be repaid by a subsequent appropriation of \$11,465,224 from the same fund, i.e., the general fund. It is difficult to imagine how such a transaction would not result in a "significant ascertainable commitment" for present or future general fund support, whatever that phrase may

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mean. And, as already mentioned, such commitments of general fund support were not intended to be made through the budget amendment process. See §§ 17-7-402(1)(b), 17-7-403(1)(d), MCA.

Having concluded, however, that significant commitments of general fund support may not be made through the budget amendment process, it remains that the Legislature may be obligated to pay valid emergency expenses from the general fund. As mentioned above, section 10-3-311(1), MCA, authorizes the Governor to "incur" emergency expenses in any amount necessary, to be paid from the general fund. This authority to "incur" expenses is distinct from the statutory appropriation of \$1 million found in section 10-3-312, MCA. Thus, although the budget amendment process is inapplicable in this instance, the Legislature may be bound by section 10-3-311(1), MCA, to appropriate money from the general fund to cover valid firefighting expenses.

III. STATE ACCOUNTING STATUTES.

Your fourth question involves the making of "interaccount loans," authorized by section 17-2-107, MCA. Interaccount loans provide funds for accounts, where expenses must be paid before the anticipated revenues are collected. See Discussion of House Bill 449, Senate Finance and Claims Committee, March 9, 1983, pages 3-4, and March 17, 1983, page 5. Examples of such accounts are: a payroll account which must make payouts every two weeks but which takes in revenues from fees only once or twice a year; a designated account of the university system which pays for inventory purchases, the costs of which are not recovered through user charges until a later date; and an account from which the Office of Public Instruction must distribute funds to schools but where the sources of funds are interest and income revenues not collected until after distribution is due. See Discussion of Senate Bill 2, Senate State Administration Committee, June 18, 1986, Exhibit No. 1. Most interaccount loans are either between two university accounts or between federal and earmarked accounts. Id., Exhibit No. 2, prepared by Kathy Fabiano, Administrator, Accounting Division, Department of Administration.

Section 17-2-107(2), MCA, provides:

When the expenditure of an appropriation is necessary and the cash balance in the account from which the appropriation was made is insufficient, the department of administration

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may authorize a transfer, as a temporary loan bearing no interest, of unrestricted moneys from other accounts, provided that there is reasonable evidence that the income will be sufficient to restore the amount so transferred within 1 calendar year and provided the loan is recorded in the state accounting records. The loan must be repaid within 1 calendar year of the date the loan is approved unless it is extended under subsection (3) or by specific legislative authorization. No account shall be so impaired that all proper demands thereon cannot be met even if the loan is extended. [Emphasis added.]

Your specific question is whether an interaccount loan may be made to a special revenue account when the borrower anticipates no income with which to repay the loan, other than the possibility of a supplemental appropriation sometime in the future. I conclude that reliance on the possibility of a supplemental appropriation does not meet the requirement of reasonable evidence of future income under the interaccount loan statute.

There are no restrictions in the interaccount loan statute on which sources of revenue may be used by the borrower to repay a loan. However, the legislative committee discussions of the statute, referred to above, suggest that the loan procedure was intended for accounts with insufficient cash balances who were awaiting funds presently due them, rather than funds which might or might not be due them in the future.

My conclusion is also supported by the statutory prerequisite that there be "reasonable evidence" of anticipated income for repayment of the loan. This requirement suggests that there be something more than a mere desire to receive income sometime in the future. The "reasonable evidence" language of section 17-2-107(2), MCA, is clear indication that the borrower must actually anticipate income to repay the loan. A discussion of this language took place in the Senate Finance and Claims Committee on March 17, 1983.

SENATOR SMITH: I would address this question to Morris Brussett [sic]: In my earlier comment, let's say you anticipated a certain amount of income within a calendar year and it is not generated. How do you expect to pay off the loan?

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MORRIS BRUSETT: We require a certification and documentation. Most of it is federal and they authorize that the federal is coming in, or a grant that is coming in. Many times it is merely a time delay. If we feel there is any possibility that the money might not come in then we do not make the loan. ...

Discussion of House Bill 449, Senate Finance and Claims Committee, March 17, 1983, page 4. See also the Committee discussion of March 9, 1983, page 6. The above-quoted discussion suggests that something more than the hope of a supplemental appropriation is needed to meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

THEREFORE, IT IS MY OPINION:

1. A disaster or emergency must be declared by the Governor before expenses may be incurred under section 10-3-312, MCA.
2. If a disaster is declared by the Governor under Title 10, chapter 3, MCA, the \$1 million statutory appropriation provided for in section 10-3-312, MCA, need not be expended before any other funds may be used for expenses associated with the disaster.
3. The budget amendment process was not intended to permit a loan from the state's general fund, where the only anticipated revenue for repayment is the possibility of a subsequent appropriation of funds from the general fund.
4. Reliance on the possibility of a supplemental appropriation sometime in the future does not meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

Very truly yours,

MIKE GREELY
Attorney General