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VOLUME NO. 45

OPINION NO. 28

COMMERCE, DEPARTMENT OF - Deposit and use of earnings on funds agreed to be loaned by Montana Board of Science and Technology Development;
INVESTMENTS, BOARD OF - Deposit of earnings on funds agreed to be loaned by Montana Board of Science and Technology Development;
PUBLIC FUNDS - Deposit and use of earnings on funds agreed to be loaned by Montana Board of Science and Technology Development;
SCIENCE AND TECHNOLOGY DEVELOPMENT, BOARD OF - Deposit and use of earnings on funds agreed to be loaned;
MONTANA CODE ANNOTATED - Sections 17-5-704, 17-6-201(8), 90-3-101(3), 90-3-305;
MONTANA LAWS OF 1993 - Chapter 623.

HELD: Investment earnings on funds earmarked to be loaned, but not yet paid out to a loan recipient, are not "payback funds" or loan repayments and therefore may not be credited to the science and technology development account to be used to cover the costs of administering programs of the Montana Science and Technology Financing Act.

September 8, 1994

Mr. Clayton Schenck
Legislative Fiscal Analyst
State Capitol, Room 105
P.O. Box 201711
Helena, MT 59620-1711

Dear Mr. Schenck:

You have requested an Attorney General's Opinion on the following question:

May the Montana Board of Science and Technology Development deposit investment earnings on funds invested by the Board of Investments to the credit of the science and technology development account, and use the earnings to cover the costs of administering its programs?

The Montana Science and Technology Financing Act is intended to strengthen and diversify Montana's economy by establishing a public-private sector partnership to encourage scientific and technological development within the state in order to keep pace with a changing economic structure and to create new jobs and expand small business opportunities. Mont. Code Ann. § 90-3-101(3) (1993). The program is generally known as the Montana Science and Technology Alliance. It is administered by the Montana Board of Science and Technology Development, which is attached to the Department of Commerce for administrative purposes. Mont. Code Ann. § 2-15-1818 (1993). The Board of Investments must allow the Board of Science and Technology Development to administer \$15.5 million of the permanent coal tax trust fund for seed capital project loans and \$8.1 million of the permanent coal tax trust fund for research and development project loans. Mont. Code Ann. § 17-6-308(3) (1993). Until the Board of Science and Technology Development makes a loan, the funds under its administration must be invested by the Board of Investments. Id.

You have informed me that when a science and technology development project loan agreement is entered into by the Montana Board of Science and Technology Development and a loan recipient, the funds are often not immediately provided to the loan recipient. Currently, the Board of Investments places the funds subject to the loan agreement in a separate account. The Board of Investments continues to invest the funds in the account. The earnings on the funds are deposited in the science and development account created by Mont. Code Ann. § 90-3-305 (1993), rather than to the state equalization aid account and the state general fund pursuant to Mont. Code Ann. § 17-5-704 (1993). Mont. Code Ann. § 90-3-305(3) (1993) authorizes the use of "payback funds" in the science and technology development account to cover administrative costs of programs authorized by the Montana Science and Technology Financing Act. You question whether interest or investment income on funds earmarked to be loaned may be deposited in the science and technology development account and used to pay such administrative costs.

Mont. Code Ann. § 90-3-305 (1993) provides that "payback of principal and earnings" on loans and agreements must be paid into the science and technology development account. It further provides:

The department [of commerce] may use all payback funds deposited in the account to cover administrative costs of programs authorized under [Mont. Code Ann. tit. 90, ch. 3]. Payback funds must be used to cover administrative costs before the funds received from the board of investments under 17-6-201(8) are used.

Mont. Code Ann. § 90-3-305(3) (1993). Similarly, Mont. Code Ann. § 17-6-201(8) (1993), pertaining to the Board of Investments, requires that, at the beginning of each fiscal year,


the board [of investments] shall, from the appropriate fund, reimburse the department of commerce for the costs of administering programs established under Title 90, chapter 3, that are not covered by payback funds available from the account established in 90-3-305.

The language of Mont. Code Ann. §§ 90-3-305 and 17-6-201(8) plainly contemplates only the deposit of the "payback of principal and earnings" or "payback funds" into the science and technology development account, and specifically provides that "payback funds" be used to cover administrative costs. Further, in House Bill 2, the act appropriating money to state agencies for the biennium ending June 30, 1995, the Montana Legislature specifically stated, "It is the intent of the legislature that the Montana science and technology alliance be funded only with revenue received from loan repayments in the 1995 biennium." 1993 Mont. Laws, ch. 623 (Department of Commerce appropriations). In my opinion, investment income on earmarked funds which have never been paid out to a loan recipient cannot be considered "payback funds" or a loan repayment. In construing a statute, my function is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-2-101 (1993). The statutes make no provision for depositing such investment income into the science and technology development account and make no provision for paying administrative costs from such funds.

THEREFORE, IT IS MY OPINION:

Investment earnings on funds earmarked to be loaned, but not yet paid out to a loan recipient, are not "payback funds" or loan repayments and therefore may not be credited to the science and technology development account to be used to cover the costs of administering programs of the Montana Science and Technology Financing Act.

Sincerely,


JOSEPH P. MAZUREK
Attorney General

jpm/ks/brf