

## 49 Op. Att'y Gen. No. 2

CONSTITUTIONS - Scope of construction by attorney general in opinion;

STATUTORY CONSTRUCTION - Construction of statute's provisions in manner which gives meaning and effect to each;

STATUTORY CONSTRUCTION - Construing intent of legislature;

STATUTORY CONSTRUCTION - Statutes presumed constitutional;

MONTANA CODE ANNOTATED - Sections 1-2-101, 17-6-305, -306 (1983), 17-6-308 (1983), -308 (1999), -308(4) (1989);

MONTANA CONSTITUTION - Article II, section 31;

MONTANA LAWS OF 1997 - Chapter 549;

MONTANA LAWS OF 1999 - Chapter 66;

OPINIONS OF THE ATTORNEY GENERAL - 48 Op. Att'y Gen. No. 12 (Mont. 2000).

HELD:

The Board of Investments may complete the payment of grants to the Montana University System from interest and income derived from the Montana Board of Science and Technology Development loans.

April 24, 2001

Mr. Mark Simonich, Director  
Montana Department of Commerce  
P.O. Box 200501  
Helena, MT 59620-0501

Dear Mr. Simonich:

Your predecessor presented the following question for my opinion:

May the Board of Investments complete the payment of grants to the Montana University System from interest and income derived from the Montana Board of Science and Technology Development loans that the legislature directed be deposited in the coal tax permanent trust fund?

It is my opinion that the loans can be paid.

### I.

In 1983, the Montana legislature established the Montana in-state investment fund. Mont. Code Ann. § 17-6-306. To establish the fund, the legislature directed that "25% of the revenue deposited after June 30, 1983 into the permanent coal tax trust fund" would be appropriated into the Montana in-state investment fund. Mont. Code Ann. § 17-6-306 (1983). Section 17-6-305 directed that the money "shall be invested in the Montana economy with special emphasis on investments in new or expanding locally owned enterprises." Mont. Code Ann. § 17-6-305 (1983). Section 17-6-308 set forth the authorized investment for which the fund could be utilized:

The Montana in-state investment fund must be invested in the securities authorized as permissible investments under 17-6-211 and in any other type of in-state investment authorized by rules adopted by the board.

Mont. Code Ann. § 17-6-308 (1983).

In 1989, the legislature created the Montana Board of Science and Technology Development (MSTD). During the same session, the legislature expanded the investments authorized by § 17-6-308 as follows:

(4) The board shall allow the Montana board of science and technology development provided for in 2-15-1818 to administer \$7.5 million of the in-state investment fund for seed capital project loans pursuant only to the provisions of Title 90, chapter 3. This authority does not extend beyond June 30, 1994. Until such time as the Montana board of science and technology development makes a loan pursuant to those provisions, the funds under its administration must be invested by the board of investments pursuant to the provisions of 17-6-201.

Mont. Code Ann. § 17-6-308(4) (1989).

From 1989 to 1997 the legislature continued to grant MSTD the authority to administer a statutorily set amount of funds from the Montana in-state investment fund. Based upon the information provided by the Montana University System and the Department of Commerce, it appears that MSTD used the funds it administered to enter into research and development loans with different units of the Montana University System from approximately 1992 until 1997. This practice changed in 1997, when the legislature amended § 17-6-308.

In 1997, the legislature deleted MSTD's authority to make research and development loans that had been authorized in prior sessions. The effective date of the amendment was July 1, 1999. In the interim period between the 1997 session and July 1, 1999, the legislature authorized MSTD to "grant up to \$2 million of interest and income from investments to research and development projects at Montana public universities." 1997 Mont. Laws, ch. 549.

Relying on this language, MSTD and the Montana University System entered into six separate grant agreements. In the agreements, MSTD agreed to grant \$2 million in funds to Montana University System campuses in exchange for the campuses' meeting the milestones outlined in the grant agreements. The Montana University System campuses relied on these grant funds to secure matching federal funds for their research and development projects.

The agreements were signed by the appropriate representatives from both MSTD and the Montana University System. Unlike the agreements of past years, these post-1997 agreements contained no reference to the grant awards being loans or to any repayment provisions. In my opinion, the agreements constitute fully-integrated, binding contracts.

In 1999, the legislature dismantled MSTD and enacted amendments to § 17-6-308. The amendments directed the Board of Investments to administer the agreements entered into by MSTD and at the same time eliminated the funds set aside for the completion of such agreements. This opinion arises out of the question of whether, given the 1999 changes, the Board of Investments can complete the research and development agreements MSTD entered into with the Montana University System.

## II.

In 1999, the legislature amended the 1997 version of § 17-6-308, which was to become effective on July 1, 1999. The amendments, in relevant part, are as follows:

(3) The ~~department~~ board shall manage the seed capital and research and development loan portfolios created by the former Montana board of science and technology development. The ~~department~~ board shall establish an appropriate repayment schedule for all outstanding research and development loans made to the university system. ~~The department shall report the schedule to the 56th legislature. The department shall develop a business investment strategy for investing in Montana business and shall present the proposal to the 56th legislature.~~ The ~~department~~ board is the successor in interest to all agreements, contracts, loans, notes, or other instruments entered into by the Montana board of science and technology development as part of the seed capital and research and development loan portfolios, except agreements, contracts, loans, notes or other instruments funded with coal tax permanent trust funds. The board shall administer the agreements, contracts, loans, notes or other instruments funded with coal tax permanent trust funds. Until the department makes a loan pursuant to the provisions of part 5 of this chapter, the \$915,000 in funds under its administration must be invested by the board pursuant to the provisions of 17-6-201. As loans made pursuant to part 5 of this chapter are repaid, the ~~department may~~

~~reinvest the principal in new loans pursuant to part 5 of this chapter board shall deposit the proceeds or loans made from the coal severance tax trust fund in the coal severance tax permanent fund until all investments are paid back with 7% interest.~~

~~(5) Beginning July 1, 1999, all repayments of proceeds in excess of 4.395 million of investments made from the coal severance tax trust fund must be deposited in the coal severance tax permanent fund. In the fiscal year ending June 30, 1998, the department shall transfer \$250,000 from the interest and earnings from job investment loans to the Montana supreme court to be used to fund the judges' retirement system.~~

1999 Mont. Laws, ch. 66.

The ultimate codification of these changes appears as follows:

(3) The board shall manage the seed capital and research and development loan portfolios created by the former Montana board of science and technology development. The board shall establish an appropriate repayment schedule for all outstanding research and development loans made to the university system. The board is the successor in interest to all agreements, contracts, loans, notes, or other instruments entered into by the Montana board of science and technology development as part of the seed capital and research and development loan portfolios, except agreements, contracts, loans, notes, or other instruments funded with coal tax permanent trust funds. *The board shall administer the agreements, contracts, loans, notes, or other instruments funded with coal tax permanent trust funds.* Until the department makes a loan pursuant to the provisions of part 5 of this chapter, the \$915,000 in funds under its administration must be invested by the board pursuant to the provisions of 17-6-201. As loans made pursuant to part 5 of this chapter are repaid, the board shall deposit the proceeds or loans made from the coal severance tax trust fund in the coal severance tax permanent fund until all investments are paid back with 7% interest.

(6) All repayments of proceeds pursuant to subsection (3) of investments made from the coal severance tax trust fund must be deposited in the coal severance tax permanent fund.

(Emphasis added.)

The 1999 legislative changes result in an inherent conflict between subsections (3) and (6). The amendments, on the one hand, have the effect of directing the Board of Investments to administer the agreements made by MSTD which were funded with coal tax permanent trust funds, and, on the other hand, eliminating the source of funding set aside to accomplish administration. This opinion relies on well-accepted principles of statutory construction to resolve that conflict.

### III.

Generally, because an opinion cannot invalidate the constitutionality of a statute and because his duties may include at some point defending the constitutionality of a statute, the Attorney General must decline to issue an opinion as to the constitutionality of a particular statute. 48 Op. Att'y Gen. No. 12, 17 (Mont. 2000). But within that context, I remain obligated to construe statutes to avoid constitutional infirmities if reasonably possible. State v. Nye, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997). In particular, I must adhere to the general rule that whenever there are differing possible interpretations of a statute, an interpretation that avoids constitutional issues is favored over one that creates them. Department of State Lands v. Pettibone, 216 Mont. 361, 374, 702 P.2d 948, 956 (1985).

In this case, my conclusion that the Board of Investments may complete the grants that were entered into between MSTD and the Montana University System is based in large part on my conclusion that any alternative interpretation would render § 17-6-308 constitutionally infirm.

The contract clauses of the Montana and United States Constitutions have been interpreted as "interchangeable guarantees against legislation impairing the obligation of contract." City of Billings v. County Water Dist., 281 Mont. 219, 227, 935 P.2d 246, 251 (1997). Article 2, section 31 of the Montana Constitution provides:

No ex post facto law *nor any law impairing the obligation of contracts*, or making any irrevocable grant of special privileges, franchises, or immunities, *shall be passed by the legislature*.

(Emphasis added.)

The Montana Supreme Court has employed a three-part test when analyzing a contract clause challenge:

- (1) Is the state law a substantial impairment to the contractual relationship?
- (2) Does the state have a significant and legitimate purpose for the law?
- (3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

Id. at 228, 935 P.2d at 251.

Addressing part (1), I conclude that elimination of the Board of Investments' ability to complete the \$2 million grant obligation to the Montana University System meets the substantial impairment standard. Without the funds, the Montana University System will not be able to complete research and development projects and will likely jeopardize matching federal funding.

Part (2) is more difficult. In order to glean the legislative intent and purpose of the 1999 law, a review of its legislative history is necessary. Unfortunately, that history is quite short and not generally helpful. The one thing that is clear from the March 3, 1999 hearing in the Senate Committee on Finance and Claims is that the bill's sponsor intended the law to be an attempt at making the coal tax permanent trust fund whole. This rationale alone serves as a legitimate and significant purpose for the law.

However, the analysis of impairment does not end with part (2). With respect to part (3), I must consider whether the application of the statute to the facts at issue is reasonably related to achieving the legitimate and public purpose of the statute. City of Billings v. County Water Dist., 281 Mont. at 227, 935 P.2d at 251. A heightened level of scrutiny applies when a governmental entity is a party to the contract. Id. Additionally, in a case such as this where the impairment is severe, the level of scrutiny to which the legislation is subject increases. Id.

While the legislature's ultimate intent to make the coal tax permanent trust fund whole is a legitimate goal, it is unreasonable to read the 1999 legislative changes to abrogate contracts the legislature had expressly authorized two years earlier. A Massachusetts court articulated the standard the United States Supreme Court has relied upon when determining the reasonableness of a statutory change that has the effect of impairing a contract obligation. The court stated:

An impairment is not a reasonable one if the problem sought to be resolved by an impairment of a contract existed at the time the contractual obligation was incurred. If the foreseen problem has changed between the time of the contracting and the time of the attempted impairment, but has changed only in degree and not in kind, the impairment is not reasonable.

Massachusetts Community College Council v. Commonwealth, 649 N.E.2d 708, 713 (Mass. 1995). The legislative history of neither the 1997 legislation nor the 1999 legislation gives any indication that factors in the state's economic, fiscal, or political climate had changed so significantly in the intervening two years as to justify such an impairment.

In my opinion, if § 17-6-308 is construed to prohibit the Board of Investments from completing the grant awards entered into between MSTD and the Montana University System, the statute would be in violation of the contract clause and rendered unconstitutional as applied to the Montana University System.

However, as stated above, when construing a statute I must seek a constitutional interpretation whenever reasonably possible. In this case, applying ordinary rules of statutory interpretation, I believe a constitutional interpretation can be found.

#### Conclusion

When it amended § 17-6-308 in 1999, the legislature created an apparent conflict between subsections (3) and (6). To the extent that the two subsections are in conflict, they should be interpreted to harmonize them and give effect to both. See Mont. Code Ann. § 1-2-101; see also Albright v. State, 281 Mont. 196, 206, 933 P.2d 815, 821 (1997). This can be accomplished if subsection (3) is read to allow the use of income from MSTD investments to complete the grants to the Montana University System, and subsection (6) is read to require that all income in excess of that needed to fund the grants be deposited in the coal tax permanent trust fund.

This construction gives effect to all parts of the enactment and avoids an interpretation that yields an unconstitutional result.

THEREFORE, IT IS MY OPINION:

The Board of Investments may complete the payment of grants to the Montana University System from interest and income derived from the Montana Board of Science and Technology Development loans.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/ans/jym