

CONSTITUTIONAL CONSTRUCTION - In interpreting a provision of the Montana Constitution, the rules of statutory construction apply;

EDUCATION, HIGHER - Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program;

PUBLIC FUNDS - The phrase "public funds" in article VIII, section 13 of the Montana Constitution does not include endowments granted to Montana's public universities;

UNIVERSITY SYSTEM - Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program;

MONTANA CODE ANNOTATED - Sections 17-2-102(4), 17-3-1001(2), -1003(1), 20-25-307(2), 77-1-101(7), -108;

MONTANA CONSTITUTION OF 1889 - Article XI, section 12;

MONTANA CONSTITUTION - Article VIII, section 13, (1), (2), (3), (4); article X, sections 2, 10;

OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 106 (1976).

HELD: Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana's public universities be invested through the unified investment program.

November 19, 2010

Ms. Tori Hunthausen, CPA
Legislative Auditor
Room 160
State Capitol Building
Helena, MT 59620-1705

Dear Ms. Hunthausen:

[P1] You have requested my opinion as to a question that I have rephrased as:

Must endowments granted to Montana's public universities be invested under the unified investment program established under article VIII, section 13 of the Montana Constitution?

[P2] Your opinion request informs me that during a recent audit it came to the attention of the Legislative Audit Division that funds endowed to the University of Montana are invested in "equity pools." While you acknowledge that the endowments are properly recorded on the state's financial records and are used in accordance with the conveying instruments, you question whether these endowments are subject to the restrictions of article VIII, section 13 of the Montana Constitution, particularly the restriction against investing "public funds" in private corporate capital stock.

[P3] The first subsection of article VIII, section 13 provides:

(1) The legislature shall provide for a unified investment program for public funds and public retirement system and state compensation insurance fund assets and provide rules therefor, including supervision of investment of surplus funds of all counties, cities, towns, and other local governmental entities. Each fund forming a part of the unified investment program shall be separately identified. Except as provided in subsections (3) and (4), no public funds shall be invested in private corporate capital stock. The investment program shall be audited at least annually and a report thereof submitted to the governor and legislature.

[P4] The Regents have set up "private, independent" foundations, such as the University of Montana Foundation, to invest funds endowed to the universities by private or federal donors, and to raise these funds. See Regents Policy 901.9 (Campus-Affiliated Foundations). You have clarified that "[d]onations given directly to the respective university foundations are not in question," as these nonprofit foundations may fundraise and invest free of the restrictions of article VIII, section 13. The question, then, is whether the phrase "public funds" as used in this constitutional provision includes donations or grants endowed directly to Montana universities for a specific purpose (hereinafter "university endowments").¹

¹ This opinion therefore includes grants from governmental entities other than the State of Montana, such as the federal government. It also includes what have been referred to as "quasi" endowments, such as a donated gift for a particular use that is not required to be permanently invested but that the university chooses to invest with an affiliated foundation.

[P5] In interpreting a provision of the Montana Constitution, I utilize the rules of statutory construction. Montanans for Laws v. State ex rel. Johnson, 2007 MT 75, ¶ 46, 336 Mont. 450, 154 P.3d 1202. In determining the framers' intent, I first look to the plain meaning of the words. Only if a phrase is ambiguous do I resort to extrinsic methods of interpretation. Id., ¶¶ 46-47. I also consider the constitutional provision as a whole, and read it in context with other relevant constitutional provisions. See Oster v. Valley County, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 (“[T]his Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each”).

[P6] Reading article VIII, section 13 in its entirety, subsection (2) expressly refers to certain university funds: “the public school fund and the permanent funds of the Montana university system” As to the former, the Constitution separately defines “public school fund” in article X, section 2 in a manner that would not include university endowments. As to the latter, the “permanent funds of the Montana university system” are not separately defined in the Constitution, but in my opinion they do not include university endowments. The Enabling Act which admitted Montana to the Union established a land grant “exclusively for university purposes,” the proceeds of which “constitute a permanent fund to be safely invested and held by [Montana].” Enabling Act, § 14 (emphasis added). It is consistent with a plain-meaning review of this provision that the Constitutional Convention Delegates had this specific Enabling Act language in mind when they crafted the reference to “permanent funds of the Montana university system” in article VIII, section 13(2). See also V 1972 Mont. Const. Conv. 1539 (“Conv. Tr.”) (Delegate Barnard) (the purpose of subsection (2) would be to “stay within the limits of the Enabling Act and [ensure] the funds remain inviolate”).

[P7] This is particularly true given the variability of the conditions imposed on university endowments. There is no rule requiring that such endowment gifts establish a “permanent fund.” If donors wish, they can create an endowment that allows the invasion of principle, or even expenditure of the entire principle. There is no sense in which the endowments collectively can be characterized as “permanent.”

[P8] Moreover, in implementing subsection (2), the university land grant created by the Enabling Act is administered not by the Regents, but by the Department of Natural Resources and Conservation in the “Trust Land Administration Account” established in Mont. Code Ann. § 77-1-108. See Mont. Code Ann. § 77-1-101(7) (including “lands granted to the state by the United States for any purpose” within the definition of “state lands”); cf. Mont. Code Ann. § 20-25-307(2) (precluding Regents from alienating “land granted to the state in trust for the support and benefit of the system.”) The “permanent

funds” referred to in subsection (2) then, should not be construed to include university endowments.

[P9] Nor does the constitutional requirement that the legislature provide for a “unified investment program for public funds” lead to the conclusion that these public funds include university endowments. In interpreting article VIII, section 13, “unified” does not necessarily mean “exclusive.” Huber v. Groff, 171 Mont. 442, 460, 558 P.2d 1124, 1133 (1976) (“The Constitution’s provision for the unified investment fund does not require that all agencies participate regardless of the nature of the agency.”). While the funds at issue in Huber were specifically not “state funds,” and the agency had set up “its own specialized investment fund with a particular purpose,” id., this distinction does not alter the analysis. Here, the university endowments at issue do not derive from “state funds.” Instead, they are private and federal funds “restricted by law, trust agreement, or contract.” Board of Regents v. Judge, 168 Mont. 433, 446, 543 P.2d 1323, 1331 (1975) (excluding from the appropriation power of the legislature private funds, including federal grants, granted to the university system for university purposes, as opposed to “the public operating funds of state government.”). And while Mont. Code Ann. § 17-3-1001(2) states that a gift made directly to the Montana university system “is a gift . . . to the state,” any attempt to legislatively define university endowments as “public” or “state” funds, and thereby exert “legislative control” over these types of funds, “is invalid to the extent it may be so read.” Id.

[P10] This appears to be the understanding of the Delegates to the Constitutional convention when they debated article VIII, section 13. V Conv. Tr. 1521 (remarks of Delegate Toole) (limit in article VIII, section 13(1) on investments of “public funds” in corporate stock would not apply to University of Montana Foundation). Accordingly, though Montana’s public universities are part of the State, the funds of university endowments are not “public funds” of the State, but instead are private or federal funds invested for the purpose of supporting a Montana university or specific program.

[P11] Other textual considerations also do not lend support to the conclusion that university endowments must be invested through the unified investment program. While article X, section 10 of the Montana Constitution places restrictions on university funds, this does not lead to the conclusion that article VIII, section 13 also applies to university endowments. The first sentence of article X, section 10 states: “The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated.” In addition, these funds “shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by the state against loss or diversion.” Id.

[P12] This provision is identical to article XI, section 12 of the 1889 Constitution, which was primarily concerned with land grant funds, not private endowments. See Blume v. Board of Education, 97 Mont. 371, 381, 34 P.2d 515, 519 (1934) (considering article XI, section 12 in the context of the land grant fund and analyzing the Enabling Act to determine applicable restrictions). It was adopted by the Delegates without debate. VII Conv. Tr. 2142. While the reference to funds “from whatever source accruing” may cover university endowments, the section provides only that they be invested “under such regulations as provided by law.” Since article VIII, section 13, does not require that university endowments be part of the unified investment program, I must consider whether other provisions of law regulate the investment of endowments.

[P13] Montana Code Annotated § 17-3-1003(1) requires that “[a]ll money received or collected in connection with permanent endowments by all higher educational institutions . . . must be paid to the state treasurer, who shall deposit the money to the credit of the proper fund.” This statute, however, requires that university endowments be “deposited” with the treasurer, not invested in any particular way, and then credited to “the proper fund.” This is essentially an accounting statute requiring that receipts and expenditures be recorded in a specific manner. The proper fund for a donated endowment is one of the “higher education funds” established at Mont. Code Ann. § 17-2-102(4). If the endowment is set up so that “the principal portion of the amount received is nonexpendable but is available for investment,” then the “endowment fund” would be the proper specific fund. See Mont. Code Ann. § 17-2-102(4)(c). Once credited to this fund, the Regents transfer the endowment funds to a “foundation for management and investment” pursuant to the Regent’s policies, which are in this context “regulations provided by law.”

[P14] Therefore, university endowments, when invested by the Regents with foundations, are invested under “such regulations as may be provided by law.” They are deposited in the appropriate fund, pursuant to Mont. Code Ann. §§ 17-3-1003(1) and 17-2-102(4), and then invested according to the Regent’s policies.

[P15] The Legislature has not enacted a statute specifically requiring the Regents to invest University funds through the unified investment program. I therefore need not reach the question of whether the Legislature may, by statute, direct the investment of university endowments in a manner that is contrary to the Regent’s policies. In any event, the constitutionality of such a statute in light of the constitutional authority of the Regents is an issue on which the Attorney General ordinarily would not issue an opinion.

[P16] In an earlier opinion relating to gifts to the School of the Deaf and Blind, Attorney General Woodahl opined “[i]f the board of public education chooses to invest

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any gifts, investment must be done pursuant to the unified investment program” 36 Op. Att’y Gen. No. 106 at 556 (1976). This statement is not supported by detailed analysis, and is of limited value given the differing constitutional powers of the Board of Public Education and the Board of Regents. For that reason I do not consider it to be controlling here.

[P17] For the foregoing reasons, it is my opinion that university endowments are not “public funds” under article VIII, section 13(1) and are not “permanent funds of the Montana University System” under article VIII, section 13(2). I therefore conclude that the Constitution does not require that university endowment funds be invested through the unified investment program.

THEREFORE, IT IS MY OPINION:

Article VIII, section 13 of the Montana Constitution does not require that endowments granted to Montana’s public universities be invested through the unified investment program.

Sincerely,

STEVE BULLOCK
Attorney General

sb/jss/jym