

ATTORNEY GENERAL
STATE OF MONTANA

Steve Bullock
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March 16, 2012

Janet R. Kelly
Director, Department of Administration
Mitchell Building
125 N. Roberts, RM 155
Helena, Montana 59620-0101

Re: Request for Letter of Advice

Dear Director Kelly:

You have written this office seeking a letter of advice. The question you present is related to a dispute that has arisen between the Department of Administration's State Accounting Division (SAD) and the Montana Legislative Audit Division (LAD) on an adjustment proposed by the LAD to Montana's basic financial statements and to this year's Comprehensive Annual Financial Report (CAFR). Specifically, the question presented is:

Are the outstanding workers' compensation claims for injuries resulting from accidents that occurred before July 1, 1990 (so-called Old Fund Claims) a legal liability of the Montana State fund or a legal liability of the State of Montana?

Because the question you've presented is fact specific to the disagreement between SAD and LAD and because it is a question that is unlikely to re-occur, we agree that a letter of advice is the appropriate response.

In support of your request, you provided a legal memorandum authored by Chief Legal Counsel for your Department. By way of background that legal memo provides that prior to this reporting period, liability for the Old Fund claims and expenses were attributed to the Montana State Fund. Up until FY11, payment of such claims and expenses was made from reserves accumulated in the Old Fund account from the Old Fund liability tax.¹ After a FY 11 payment of \$16,657,355, however, the accumulated reserves have been depleted. As a result, payment of claims and expenses for FY12 will require a transfer from the general fund to the Old Fund account.

¹ Determining that the account was adequately funded, the Legislature discontinued the Old Fund Liability tax in 1999.

Because payment of the Old Fund claims and expenses in FY 12 will require a transfer of general fund dollars to the Old Fund account, LAD has determined the claims should be reported as a general, long-term liability for the State of Montana.

The law governing assets and liabilities of the Old Fund clearly provides that the legislature intended for the State Fund to “assume liability for all outstanding claims and indebtedness of the previously existing state fund.” Mont. Code Ann. §39-71-2319. In addition to designating the State Fund as the entity legally liable for outstanding claims and indebtedness of the Old Fund, the Legislature created a separate payment structure and a separate funding source for payment for claims of injury occurring before July 1, 1990 (claims against the Old Fund) and for those claims occurring on or after July 1, 1990 (claims against the State Fund). The legislature also provided for contingency funding in the event that revenue from the Old Fund liability tax did not cover the cost of claims. Section 39-71-2352(6) provides for that contingency, it states “[i]f in any fiscal year after the old fund liability tax is terminated claims for injuries resulting from accidents that occurred before July 1, 1990, are not adequately funded, any amount necessary to pay claims for injuries resulting from accidents that occurred before July 1, 1990, **must be transferred from the general fund to the fund provided for in 39-71-2321.**” (Emphasis added).


As noted above, up until FY 11 revenue generated from the Old Fund liability tax had covered claims associated with injuries occurring before July 1, 1990. In FY 11, the Old Fund liability tax revenues were depleted and pursuant to Mont. Code Ann. §39-71-2352(6), \$50,000 was transferred from the general fund to the Old Fund account to cover the full cost of claims. Because the Old Fund liability tax reserves have been fully depleted, after FY 11 all future payments of Old Fund claims will require a transfer from the general fund to the Old Fund account. The LAD has thus concluded that beginning in FY 12, liability for Old Fund claims should be reported as a general, long-term liability for the State of Montana.

While the general fund becomes the funding source to pay claims and expenses against the Old Fund in FY 12, the State Fund not the State of Montana remains the entity **legally** liable for such claims. This conclusion is supported both by the plain language of section 39-71-2319 and the contingency provision in section 39-71-2352(6). By providing for a transfer from the general fund to the Old Fund account, the Legislature created a payment structure that reflects the intent expressly stated in section 39-71-2319, “the State Fund shall assume liability for all outstanding claims and indebtedness of the previously existing state fund.” LAD suggests that section 39-71-2352(6) subrogates the liability for Old Fund claims to the general fund. I do not think the theory of subrogation applies to this issue. Black’s Law dictionary defines subrogation to mean “the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.” Black’s Law Dictionary (8th ed. 2004). In this instance, the State Fund is not substituted as the party bearing responsibility to pay. The State Fund’s **legal** liability did not terminate when the Old Fund liability tax reserves were depleted. The entity responsible for payment of claims—the State Fund—remains the same. It is the funding source for payment of those claims that has changed.

In a letter submitted in response to your request, LAD suggests that the question at issue is not one of legal liability; rather, it is a more technical question of financial reporting. Because the question you pose is which entity - the State of Montana or the State Fund - has *legal* liability that is the question answered in this letter. However, in light of LAD's concern, perhaps the obligation to pay the claims and expenses associated with Old Fund injuries could be reported as an obligation of the State Fund to the claimants, and an obligation of the general fund to the State Fund to provide the resources to pay the claims.

This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,


ALI BOVINGDON
Deputy Attorney General

AB:sj

c: File