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September 26, 2005

Carroll South, Executive Director
Montana Board of Investments
2401 Colonial Drive, Third Floor
P.O. Box 200126
Helena, MT 59620-0126

RE: *Montana State Fund Office Building*

Dear Carroll:

You have asked our opinion whether the Board of Investments (the "Board") may invest Board managed assets of the Montana State Fund (the "Fund") in a new office building to house the Fund's operations.

It is our opinion that the Board may invest assets of the Fund in an office building to house the Fund's operations under the proper circumstances.

Article VIII, Section 13(4) of the Montana Constitution provides that "Investment of state compensation insurance fund assets shall be managed in a fiduciary capacity in the same manner that a prudent expert acting in a fiduciary capacity and familiar with the circumstances would use in the conduct of a private insurance organization. . . ."

Because the above quoted constitutional provision directs the Board to act in the same manner as a prudent expert would for a private insurance organization, it is necessary to review the statutes governing the investments of private insurance companies contained in Title 33 of the Montana Codes Annotated. Although the Fund is exempt from that title, the provisions of Title 33 can and should be used in applying and interpreting the provisions of the constitutional provision. Under § 33-12-307(3)(a), MCA, governing insurer investments, "[a]n insurer may acquire, manage, and dispose of real estate for the convenient accommodation of the insurer's or the insurer's affiliate's business operations, including home office, branch office, and field office operations. It

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is clear, therefore, that a private insurance company may invest its assets in real estate for its own business operations.

The Legislature has further authorized the board of directors of the Fund under § 2-15-1019, MCA, to provide office space for itself and for the Fund. While the investment decision ultimately belongs to the Board, the approval of the Fund's board of directors must also be obtained in connection with the power granted to it to provide the office space and, further, with its authority and responsibility to approve the expenditure of funds for rental of office space.

Finally, as you know, the principles of a prudent expert acting in a fiduciary capacity must be considered in determining whether or not the investment of Fund monies in an office building is a prudent investment of those funds. That of course is determined by, among other things, construction costs and fair market rental.

If you have any questions, please do not hesitate to contact me.

Sincerely,

PATRICK E. MELBY

for LUXAN & MURFITT, PLLP

PEM/kb