

While somewhat analogous to the Taylor Grazing situation, the Mineral Leasing Act (MLA) situation differs in a couple of significant respects. First, the circumstances surrounding the state's use of MLA revenues is simply not as clear the situation with respect to the TG revenues. Second, the statutory language under the MLA differs from that of the TG statute, so the end results might differ accordingly.

In terms of background, it is our understanding that the federal government makes periodic distributions to the State of Montana of various mineral lease revenues. Based on the materials that you've provided from the U.S. Department of Interior, Minerals Management Section, Royalty Management Program, it appears that the total revenue distributed to the state in FY 98 was somewhere in the neighborhood of \$22 million dollars. Of that total, approximately \$1.15 million appears to have been attributable to gas royalties in Phillips County. Three other counties (i.e., Big Horn [coal], Fallon [oil/gas] and Rosebud [coal]) appear make up the lion's share of the balance (approximately \$19 million).

³ As you know, these are the type of funds received by districts whose tax base is significantly impacted by a federal activity or presence such as an Indian reservation or military installations.

EXHIBIT 7
DATE 1.25.11
HB 170

Ed Amestoy
March 23, 2000
Page 7

While we have not confirmed it, it is also our understanding that all of the revenues disclosed on the above-referenced report are being distributed to the state pursuant to 30 U.S.C. § 191, which provides as follows:

(a) All money received from sales, bonuses, royalties including interest charges collected under [30 U.S.C. § 1701 *et seq.*] and rentals of the public lands under the provisions of this chapter and [30 U.S.C. § 1001 *et seq.*] shall be paid into the Treasury of the United States; and, subject to the provisions of subsection (b) of this section, 50 per centum thereof shall be paid by the Secretary of the Treasury to the State. . . within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any of such States on or after January 1, 1976, to be used by such State and its subdivisions, as the legislature of the State may direct *giving priority to those subdivisions of the State socially or economically impacted by the development of the minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provisions of public service;* . . .

(emph. supplied). Based on the information that we've been able to gather (which is consistent with what you've already gathered), it appears that the payments made by the federal government to the state are simply placed in the general fund in their entirety, with no "earmarking" or other form of specific allocation of those funds for expenditures related to the counties to which they are attributable. Chris Herriges contacted Don Hoffman at the Department of Revenue, who confirmed their placement in the general fund. While he indicated that he thought there was a statute specifically relating to that allocation, he wasn't able to identify it and neither Chris nor I have yet been able to find anything along those lines.

At any rate, assuming that the state is in fact simply placing them in the general fund with no limitations as to their expenditure, it would appear that a strong argument can be made that such treatment is in violation of federal law. Again, just as with the TG statute, while the funds can be used "as the legislature . . . may direct", there are limitations on that discretion. In the case of MLA revenues, Congress has very clearly indicated that they must be "used" by the state in a fashion that:

- gives "priority" to those subdivisions socially or economically impacted by the development of minerals leased under federal law AND
- uses them for
 - planning;
 - construction and maintenance of public facilities; and
 - provision of public service.

Thus, assuming (1) that the revenue payments fall within the scope of 30 U.S.C. § 191 and (2) that the state is in fact simply placing them in the general fund, the situation would appear to present a

Ed Amestoy
March 23, 2000
Page 8

viable basis for pursuing a claim against the state. I would note, however, that the MLA language provides the state with considerably more latitude than the TG statute in terms of how the revenue might ultimately be expended. First, the MLA statute speaks in terms of "subdivisions", which theoretically includes both counties [See § 7-1-2101, MCA] and school districts. It is not clear whether or not it includes municipalities. The point, however, is that the state has more flexibility in terms of to whom it gives "priority" in expending the funds under the MLA than it does under the TG statute, which requires expenditure for the "benefit" of only the county. Second, the MLA statute speaks in terms of "priority", rather than "benefit". So long as the "priority" given by the state ultimately involved the direct allocation to or expenditure of MLA revenues in Phillips County or any subdivisions located therein, that distinction may not be one of any substance. Nonetheless, the concept of "priority" gives the state a bit more latitude than the idea of a "benefit" in terms of how they decide to spend the MLA revenues.

Finally, so long as the requisite "priority" is given, the MLA statute broadly allows for the expenditure of the funds for (1) planning; (2) construction and maintenance of public facilities; and (3) provision of public service. The term "provision of public service" is obviously very broad and would, in theory, give the state considerable latitude in terms of what type of "public service" they used the money for. Again, so long as Phillips County received some type of "priority" in terms of those expenditures, the county would obviously receive more benefit from the revenues than they currently receive. Our point, however, is that it might well be possible for the state to still retain absolute control over the expenditure of MLA revenues, so long as they could demonstrate that they were giving a "priority" to impacted subdivisions in doing so.

That, in turn, raises a consideration in terms of the possibility of the state simply deciding to use some of the MLA revenues for school equalization purposes. I can certainly conceive of the state deciding that it will comply with federal law by giving "priority" to local school districts by pulling the same thing that they are currently pulling with the TG revenues, i.e., using MLA revenues to "backfill" the 55 mills in "impacted" districts. Under that scenario, however, we would not have the luxury of being able to make arguments concerning any specific "benefit" to Phillips County. Further, I think the *Bruno* and *Oklahoma* cases mentioned above in connection with the TG revenues could prove to be a hurdle in challenging that type of use.

The upshot of the MLA situation is this -- if the circumstances are as we understand them to be, there is a strong argument to be made that the state's treatment of the MLA revenues is in violation of federal law. By the same token, however, the state has much more latitude in terms of how it might ultimately go about rectifying the violation than it does with respect to the TG situation. In other words, the "fix" to any MLA violation may be considerably more complex than a remedy for the TG

Ed Amestoy
March 23, 2000
Page 9

situation and the litigation alone may not provide an effective vehicle for "shaping" that remedy.⁴

C. Conclusion

Based on the circumstances as we understand them, sound arguments can be made that the state's treatment of both the TG and MLA revenues is in direct violation of federal law. While it is always difficult to foresee what types of defenses and problems you might run into that could send a case "south", so to speak, the claims at this point certainly appear to be ones upon which Phillips County would stand a good chance of prevailing.

As I indicated on the phone, however, we have not taken an extensive look at some of the more mechanical aspects of pursuing any litigation based on those claims (i.e., which specific parties to name, whether the claims would be brought in two separate lawsuits or one action, where it could be brought, what type of relief could be sought, etc.). As an initial observation, however, we are proceeding on the assumption (1) that you should proceed with two separate cases (given the lack of congruity between the TG and MLA counties and the lack of congruity between the two statutes)⁵ and (2) that both cases would most likely involve a simple declaratory judgment initiated in state district court seeking prospective relief. In terms of forum, while we've briefly looked at the possibility of being able to pursue these claims in federal court, our initial impression is that you would have substantial 11th Amendment problems in that regard.

While we've also briefly discussed the idea of possibly seeking the recoupment of TG and/or MLA revenues going back in time (i.e., perhaps as far back as the 5 year "generic" statute of limitations), our initial impression is that you may also encounter substantial problems in that regard, particularly with respect to the MLA revenues. In short, while that remains a possibility and you could conceivably set up complaints that seek such relief, my point is that it is probably safer to proceed on the more conservative assumption that you would be trying to enhance future revenues through litigation, as opposed to trying to recover any past revenues.

I trust that you will now want to review and discuss our assessment further with your Commissioners. As you and I have discussed, it would obviously make more sense to seek the involvement of and financial contributions from as many TG and MLA-impacted counties as possible in terms of pursuing any litigation. With that in mind, we certainly have no objection if you want to share our assessment with those other counties in the context of soliciting their participation in possible litigation. We would suggest, however, that you consider "boiling down" the specific contents of this

⁴ As you'll note below, there are some strategic considerations at play here in terms of the next legislative session.

⁵ There may also be some strategic considerations here in terms of timing and sequence (i.e., Wayne's thought that we should go after the TG issue first before attacking the MLA issue)

Ed Amestoy
March 23, 2000
Page 10

letter into one of your own to be directed to other county attorneys in an effort to preserve any privilege attached to the contents of our letter.

Finally, I know that your Commissioners wanted a rough sense of what it might cost to litigate these type of cases. While those type of estimates are always difficult to make, we do believe that the issues presented under both statutes are relatively discrete and straightforward. From a relatively conservative standpoint, we would estimate that pursuing a declaratory judgment through a district court decision on either one of these issues would likely run somewhere in the neighborhood of \$15 - \$20,000.00. If the issues in the proceeding could be kept clean, it might prove to be somewhat less than that. On the other hand, if the litigation were to somehow get bogged down in unforeseen collateral issues, the costs could be higher than that. Finally, if the district court decision was appealed to the Supreme Court, you'd probably be looking at additional fees in the neighborhood of \$5,000 to \$7,500, depending upon how many briefs you had to do.

The issue of litigation costs also raises the strategic consideration that I alluded to above. In the "lessons learned" category, the LGST litigation provides a blunt demonstration of the potential effect that subsequent legislation can have on this type of litigation. For example, the county could conceivably file the TG action and spend \$15,000 on summary judgment briefing challenging the allocation of TG revenues to the 33 mill levy, only to have the 2001 Legislature revise the law in a fashion that effectively "moots" the lawsuit.

With that in mind, we would suggest considering the possibility of simply initiating the litigation before the next session, and then offering up legislation that (1) removes the allocation to the 33 mill levy presently contained in § 17-3-222, MCA and (2) removes the reference to TG revenues from § 20-9-331(1)(a), MCA. While we don't have any specific recommendations as to how that remaining 50% should be allocated in any draft legislation, it should involve some type of reallocation to a "pure" county fund (i.e., general, road, etc.) to ensure compliance with the exclusive reference to "counties" in the TG statute. The point, of course, would be to pave the way for the state to fix the problem without the county having to spend the money on actually litigating the declaratory judgment through to resolution. If it became apparent at any point that the state was unwilling to voluntarily change the law, you could certainly pursue and follow through with the litigation. Likewise, even if the state ultimately changed the law in a fashion that still presented a problem, you could then amend the original action and challenge the new law. Under either circumstance, however, you would avoid spending a substantial sum of money challenging a law that may no longer exist after next session.

The same consideration exists with respect to the MLA situation, perhaps in an even more significant way. As is obvious, any "fix" to the MLA situation will ultimately have to be made legislatively and will likely prove to be fairly complex. With that in mind, you may want to consider reviewing some statutes from other western states to see if any of them have one that gives (1) appropriate "priority" to impacted subdivisions and (2) directs expenditure of the funds in a fashion otherwise consistent with the federal statute. As one example, based on my brief review of a

Ed Amestoy
March 23, 2000
Page 11

Comptroller General's Opinion dealing with MLA and PILT funds, it appears that Utah has statutory provisions dealing with the MLA revenues that create a "Permanent Community Impact Fund" and an impact board that, among other things, makes grants and loans to impacted subdivisions for the three purposes outlined in 30 U.S.C. § 191. See Utah Code Annotated, § 65-1-64.5. Again, while it may well be easy to initiate litigation based on the treatment of MLA revenues and perhaps even demonstrate a violation of federal law, it will be much more difficult (if not impossible) to shape any legislative "fix" that might result from the litigation through that litigation alone. The point here would be to at least attempt to retain some level of control not only over the question of whether or not the problem is rectified, but the specific manner in which it might get rectified.⁶ If you could offer a "fix" to the state that resolves the federal law violation *and* produces the type of result you want, the litigation would at least provide a degree of "leverage" in terms of getting that "fix" implemented.

At any rate, there is at least a possibility that neither of the cases would have to be prosecuted through to conclusion, but rather that their initiation alone could give you sufficient "leverage" to obtain satisfactory results legislatively. If that were to occur, the ultimate litigation costs would obviously end up being lower than the estimates outlined above.

Hopefully this will have provided you and your Commissioners with a firm basis upon which to decide whether or not to pursue these theories in litigation. If any of you have any questions at all, please do not hesitate to give me a call. As I've indicated before, we would be more than happy to represent Phillips County (and any other participating counties) in pursuing litigation based on the claims discussed above. Please give me a call after you've had a chance to discuss this matter with your Commissioners and let me know where things stand.

Sincerely,

GOUGH, SHANAHAN, JOHNSON & WATERMAN

legislature and the Superintendent of Public Instruction who have the most direct and immediate responsibility for carrying out the state's constitutional policy of providing for the education of all children—although all public offices are bound by it. Under the federal and state statutes mentioned, the legislature and superintendent have designed a system for distribution of national forest funds in consonance with the state's duty under the constitution.

Under RCW 28A.41.130, the funds coming under the jurisdiction of the Superintendent of Public Instruction are allocated according to the state's equalization scheme:

From those funds made available by the legislature for the current use of the common schools, other than the proceeds of the state property tax, the state superintendent of public instruction shall distribute annually as provided in RCW 28A.48.010 to each school district of the state operating a program approved by the state board of education, an amount which, when combined with the following revenues, will constitute an equal guarantee in dollars for each weighted student enrolled, based upon one full school year of one hundred eighty days:

(5) Eighty-five percent of the receipts from federal forest revenues distributed to school districts pursuant to RCW 36-33.110;

(Italics ours.)
In treating 85 per cent of the forest funds paid over to the affected school districts as a part of the state general scheme of equalization, the Superintendent of Public Instruction is complying with the letter and the spirit of the statutes controlling the distribution of equalization money and in obedience to the constitutional mandate that:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders
Const. art. 9, § 1.

Significantly, we find no federal legislation which appears to directly preclude distribution of federal moneys to the schools in the manner directed by state statute or with the Superintendent of Public Instruction's system of equalization here under challenge.

Plaintiff school districts invite our attention to three cases, *Shepherd v. Godwin*, 280 F.Supp. 869 (E.D.Va.1968); *Hergenreter v. Hayden*, 295 F.Supp. 251 (D.Kan. 1968); and *Douglas Independent School Dist. No. 3 v. Jorgenson*, 293 F.Supp. 849 (C.D.So.Dak.1968), dealing with what are commonly described as "federal impact funds"—funds paid directly by the United States pursuant to 20 U.S.C. §§ 236-240. (1969), to school districts which have been subjected to drastic increases in enrollment because of federal activity such as army posts, air bases, naval shipyards, training stations, and the like. Neither these cases nor the statutes with which they deal appear applicable here and provide little, if any, rationale for the solution of the instant question. Had Congress intended to rest the distribution of forest funds upon the idea of the direct impact of a federal activity upon the enrollment of the affected school districts, it could easily have done so. That it retained the two kinds of distribution side by side throughout the years serves more to support than to detract from the Superintendent of Public Instruction's method and system now under examination.

The Supreme Court of Oklahoma has passed directly on this question and the very statute (16 U.S.C. § 500 (1960)) from which it arises. State ex rel. Board of Education, etc. v. State Board of Education, 293 P.2d 583 (Okla.1956), discussed the same question as we have before us, i. e., whether Congress, in making federal forest funds available to the schools, intended to preclude the state from taking these funds into consideration when allocating state school equalization moneys to all of the state's districts. In that case, the court affirmed and adhered to the rationale of its earlier decision in State ex

rel. Bds. of Ed., etc. v. State Board of Education, 289 P.2d 653 (Okla.1955), holding it proper to reduce state aid to the school districts by the amount of federal forest control rentals paid by the United States to certain districts. 33 U.S.C. § 701c-3. The court said [289 P.2d, at 655]:

[W]e do not construe the Federal Statute as attempting to control the method by which this State apportions its own funds appropriated for Equalization Aid to its schools. There is, therefore, no violation of the Federal Statute.

Finally, it should be noted that the modus operandi adopted by the Superintendent of Public Instruction, in including the amount of national forest funds in and treating them as a part of the state's total equalization scheme, finds strong decisional support in *King County v. Seattle School Dist. No. 1*, 263 U.S. 361, 44 S.Ct. 127, 68 L.Ed. 339 (1923), where, referring to the very statute involved here, the court said that:

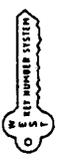
[i]t does not direct any division of the money between schools and roads. Its language above quoted indicates an intention on the part of Congress that the state in its discretion may prescribe by legislation how the money is to be expended. No distribution to the appellee or any other school district is required. The public schools and public roads are provided and maintained by the State or its subdivisions, and the moneys granted by the United States are assets in the hands of the State to be used for the specified purposes as it deems best. See State ex rel. Moore v. Callvert, 34 Wash. 58, 61, 74 P. 1018.

We are of the opinion, therefore, that 16 U.S.C. § 500 (1960) which makes available national forest funds to school districts of the state having national forests within their areas, does not preclude the Superintendent of Public Instruction from including them in state equalization funds. In carrying out his mission to implement the state's paramount duty of making ample provision for the education of all children residing within the state's border and in

accordance with the statutes of the state, national forest funds may be regarded as a part of the state's equalization funds. The Superintendent of Public Instruction is thus empowered to take these national forest funds into consideration and deduct them in whole or in part as the state statutes allow from the state equalization funds distributed to the school districts of the entire state.

Arguments advanced under the Fourteenth Amendment we find to be without merit and, having found no inconsistency between federal statute and state law, we see no issue related to the supremacy clause of the United States Constitution. Affirmed.

HAMILTON, C. J., and FINLEY, ROSELLINI, HUNTER, NEILL, STAFFORD, WRIGHT and UTTER, JJ., concur.



81 Wash.2d 46

In the Matter of the Disciplinary Proceedings Against Jerald R. JOHNSON, Attorney at Law.
No. C. D. 5246.

Supreme Court of Washington,
En Banc.

July 27, 1972.

Disciplinary proceeding. The Supreme Court held that attorney's refusal to account for client's funds given in trust warranted disbarment.
Order accordingly.

I. Attorney and Client 6-32
Attorney's failure to account to client, although repeated demands were made, and failure to respond in disciplinary proceedings, violated Canons of Professional Ethics. CPE 11.

See also *In re Simmons*, 59 Wash.2d 689, 369 P.2d 947 (1962). The recommendations of the hearing panel and of the Board of Governors are advisory only. *In re Ross*, 66 Wash.2d 233, 401 P.2d 975 (1965); *In re Pennington*, 73 Wash.2d 601, 440 P.2d 175 (1968).

[3] This matter differs from *In re Little*, 40 Wash.2d 421, 244 P.2d 255 (1952), in that here the testimony was taken directly before the Board of Governors, which actually saw and heard the witnesses. The findings are supported by substantial evidence. We therefore accept the recommendation.

Petitioner's application for reinstatement is granted subject to his passing the examination provided in Rule 4 of Admission to Practice Rules.

HAMILTON, C. J., and FINLEY, ROSELLINI, HUNTER, HALE, NEILL, STAFFORD and UTTER, JJ., concur.



81 Wash.2d 82

H. J. CARROLL et al., Appellants,
v.

Louis BRUNO, Superintendent of Public Instruction, State of Washington; and Robert S. O'Brien, Treasurer, State of Washington, Respondents.

No. 42185.

Supreme Court of Washington.

En Banc.

July 27, 1972.

Action by school districts attacking Superintendent of Public Instruction's distribution of equalization funds. The Superior Court, Thurston County, Frank E. Baker, J., found for the Superintendent and school districts appealed. The Supreme Court, Hale, J., held that in treating 85% of forest funds paid over to affected school

districts by federal government as part of state general scheme of equalization, Superintendent of Public Instruction complied with law.

Affirmed.

Schools and School Districts (191)

In treating 85% of forest funds paid over to affected school districts by federal government as part of state general scheme of equalization, Superintendent of Public Instruction complied with law. RCWA 28A.41.130, 36.33.110; 16 U.S.C.A. § 500; RCWA Const. art. 9, § 1; U.S.C.A. Const. art. 6, cl. 2; Amend. 14.

Beresford & Booth, Wayne C. Booth, Seattle, for appellants.

Slade Gorton, Atty. Gen., Robert E. Paterson, Asst. Atty. Gen., Olympia, for respondents.

HALE, Associate Justice.

The United States owns a number of national forests in this state which are not subject to state or local taxes. As a contribution in lieu of taxes, the federal government pays to the state each year 25 per cent of all moneys received from national forest timber sales and other national forest services. 16 U.S.C. § 500 (1960). These national forest funds are by law earmarked for the benefit of the public schools and public roads of the counties in which the national forests are situated.

By state statute (RCW 28A.41.130), the Superintendent of Public Instruction includes 85 per cent of these national forest funds allocable to the schools in distributing so-called state "equalization funds" to school districts in which all the projected revenues available to the districts fall below a state per-student minimum. Conforming to state statute, the superintendent credits most of the federal forest funds before determining the amount of state equalization money to be distributed by the state to its school districts. Appellants contend that the superintendent should not

credit the school districts with receipt of the funds before determining the state contribution, but rather that the district should be entitled to the state contribution and then, in addition, the federal forest moneys.

The trial court held the Superintendent of Public Instruction's distribution of the money to be both constitutional and within the federal and state statutory schemes—a decision which we affirm.

Plaintiff school districts make two principal contentions: (1) that federal statutes which make the money available to the schools of this state specify that the money shall be distributed only to the school districts which have national forests within their territorial boundaries, and (2) that to include federal forest funds in the general statewide equalization formula spreads the benefits to the entire state and thus deprives the districts designated by federal law from the very benefits intended to be granted them. This method of distribution, they claim, operates to deprive them of equal protection of the laws under the Fourteenth Amendment, and contravenes the statute which makes the money available. Further, the present system, it is contended, deprives plaintiff school districts of the protection of the supremacy clause of the federal constitution (U.S. Const. art. 6) which, they assert, makes the act of Congress in this instance supreme and controlling.

Plaintiffs' position, while not without merit, we think, expresses neither the sole nor the more persuasive construction of the statutes. National forest funds come to the state through 16 U.S.C. § 500 (1960), first enacted in 1908 and subsequently amended from time to time so as to read:

Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in

which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber.

The state distributes this money to two schools principally upon the basis of two statutes, RCW 36.33.110 and RCW 28A.41.130, the first of which refers directly to the forest funds and to the statute from which they are derived:

The state treasurer shall turn over to the treasurers of the counties within United States forest reserves, the amount of money belonging to them, received from the federal government from such reserves, in accordance with Title 16, section 500, United States Code. Where the reserve is situated in more than one county the money shall be distributed in proportion to the area of the counties interested, and to that end the state treasurer is authorized and required to obtain the necessary information to enable him to make the distribution on such basis.

County commissioners of the respective counties to which the money is distributed are authorized and directed annually to distribute not less than fifty percent of said money to each school district within each such county according to the proportional number of weighted students enrolled in each such school district during the immediate preceding school year as certified by the county school superintendent of schools or the intermediate district superintendent of schools as the case may be . . .

RCW 36.33.110.

In the second statute (RCW 28A.41.130), to achieve a fair measure of equality, the state has adopted an equalization system of equal funding based on a formula for each weighted student in each district. It is the