

ATTORNEY GENERAL
STATE OF MONTANA



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Governor Brian Schweitzer
State Capitol
P.O. Box 200801
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Dear Governor Schweitzer:

Thank you for your request for an opinion from my office concerning whether, consistent with the mandates of the Montana Constitution, the costs of administering public school trust lands and the trust lands of Montana's institutions of higher education can be paid from the income received from the trust lands and the interest earned on the trust funds. After a careful review of the relevant Montana law and in keeping with the policies previously adopted by this office for addressing requests, I am providing you counsel on the status of the law as it currently exists.

Your request involves a question of whether certain Montana statutes¹ that provide for funding administrative costs for the management of school trusts are constitutional. All Montana statutes are presumed to be constitutional under accepted principles of statutory construction. T & W Chevrolet v. Darvial, 196 Mont. 287, 641 P.2 1368 (1982). The Supreme Court has reaffirmed that constitutional presumption numerous times, most recently in Montanans for the Responsible Use of the School Trust v. Darkenwald, 2005 Mont. 190, ¶ 22, 2005 Mont. Lexis 347, (*r'hear. denied*) (2005).

As you have noted in your request (with the express exception of the Morrill Trust), there is no language within the enabling acts for the common school trust or for the higher education trusts that would restrict what is now settled law allowing reasonable costs of managing the trusts or trust funds to be deducted from revenue generated by the trusts themselves. U.S. v. Swope, 16 F.2d 215, 219-20 (8th Cir. 1926). Review of the language in the Montana Constitution also shows no restriction on the payment of

¹ "Attachment A" to the Trust Land administrative costs analysis references the numerous statutes in Title 77, Mont. Code Ann., that provide for necessary administrative costs.

administrative costs from the revenue generated by the trusts. The well-settled law of trusts allows for reasonable management costs to be deducted from the revenue generated by the trusts. State ex rel. Bickford v. Cook, 17 Mont. 529, 43 P. 928 (1896); See, Moon v. State Board of Land Comm'rs, 111 Idaho 389, 724 P.2d 125 (1986). It is the reasoned and common interpretation that where a trust is established to generate revenue, costs of administering and managing the res of the trust are anticipated. Absent restrictive language in the creating documents (and here we have none) the restriction would be limited only by whether the costs were reasonable, or were otherwise restricted by legislative enactments. Price v. State of Hawaii, 921 F. 2d 950, 956 (9th Cir. 1990).

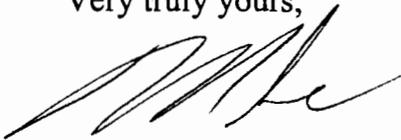
The language within article X section 5 of the Montana Constitution does not restrict income to "gross" income as opposed to the well settled practice of deducting reasonable costs of managing a trust with the net remainder considered the income revenue to that trust. The language at article X section 5 provides for the relative allocation of income revenue and interest to be appropriately applied for the schools (95%) and the trust fund (5%) (as opposed to funding any other operation of state government) but does not by that relative allocation prohibit using revenue to administer those trusts. (See Committee Proposals, Constitutional Convention, Vol. II, pp. 727-728, where the discussion focused upon the revised equitable apportionment of the revenues to the schools, not upon the 95%-5% allocation to the trust and trust fund which remained the same as in the 1889 Constitution.) Likewise article X section 10 directs that university funds and accruals on those funds should also remain used solely for the purposes of the university system as opposed to any other operation of state government.

I would not interpret the State's fiduciary responsibilities for management of either the trust lands or the trust fund differently from the analysis provided by former Attorney General Forrest Anderson in his 1967 opinion regarding the use of income from trust lands for trust lands improvement and development. In that opinion, 32 Op. Att'y Gen. No. 8 (1967), the Attorney General reviewed both the Enabling Act, Act of February 1989, § 11, ch. 180, 25 Stat. 676 (1889) and the Montana Constitution in determining whether they conflicted with the statute. While there was no express discussion of article X section 5 or article X section 10, in his pre-1972 opinion, Attorney General Anderson found that managing the trust lands using trust funds did not violate the 1889 Constitution or the Enabling Act. Additionally, in a February 24, 1970 letter to then Commissioner of State Lands and Investments, Ted Schwinden, Attorney General Robert Woodahl affirmed the general conclusions reached by Attorney General Anderson.

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For the reasons discussed, I believe the statutes are defensible in the event of a constitutional challenge.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike McGrath", written in a cursive style.

MIKE McGRATH
Attorney General