July 1990

Public Purpose and Economic Development: The Montana Perspective

Mae Nan Ellingson

Guest Speaker; Delegate to 1972 Constitutional Convention

Jerry C. D. Mahoney

Guest Speaker

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation

Mae Nan Ellingson and Jerry C. D. Mahoney, Public Purpose and Economic Development: The Montana Perspective, 51 Mont. L. Rev. (1990), Available at: https://scholarship.law.umt.edu/mlr/vol51/iss2/9

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
PUBLIC PURPOSE AND ECONOMIC DEVELOPMENT

The Montana Perspective*

Mae Nan Ellingson** and Jerry C.D. Mahoney***

I. INTRODUCTION: MONTANA'S ECONOMY

Over the past several years Montana consistently has been characterized as having a poor business climate. For example, in its seventh annual study of general manufacturing climates of the forty-eight contiguous states, Grant Thornton rated Montana's business climate forty-sixth nationally and ninth out of nine regionally. The study compared Montana with other states on such factors as taxes, debt, welfare expenditures, wages, unionization, workers' compensation, the characteristics of the work force, energy costs, environmental control and population density. In the 1986 ranking, the analysts categorized all these factors as governmental factors and non-governmental factors; Montana's governmental factors ranking was forty-one, and its non-governmental factors ranking was forty-four.

Using a slightly different ranking system in 1988 (again the higher the number, the more unfavorable the rating), Grant Thornton ranked the states in five separate categories. Montana's ranking in those categories were: government fiscal policies, forty-

* This paper was presented as part of the Finance Panel at the Constitutional Symposium '89, November 16, 1989. Members of the panel included Mae Nan Ellingson, moderator, Chet Blaylock, Wendy A. Fitzgerald, Daniel Kemmis, James Koch, Justice Russell McDonough, and Thomas Towe.

** B.S., University of Montana, 1972; J.D., University of Montana, 1976; Delegate to the 1972 Montana Constitutional Convention; Partner with Dorsey & Whitney, Missoula, Montana.

*** B.S.L., University of Minnesota 1953; LL.B., University of Minnesota 1955; Partner with Dorsey & Whitney, Minneapolis, Minnesota.
FINANCE

sixth; employment costs, forty-first; labor costs, twenty-sixth; use of resources, thirty-ninth; and quality of life, thirteenth.

Inc. magazine’s 1988 Report on the States, rating all fifty states on the basis of new jobs, new companies and climate for growth during the preceding four years, rated Montana forty-eighth.¹ Recent studies reflect a deterioration of Montana’s economic health during the early eighties in relation to other states.² Concern about this decline has caused many Montanans to give economic development and improvement of the state’s business climate top priority for the collective will. Even those who believe the government that governs best is the government that governs least have come to believe that government has a role to play in the economic development and well-being of the state. In November of 1983, by initiative, Montana voters mandated that the state invest in the state’s economy a portion of its coal severance tax trust fund, which had been established by a constitutional amendment in 1976.³ The stated objectives of the initiative were to diversify, strengthen and stabilize the Montana economy, and to increase Montana employment.⁴ This initiative, as implemented by the legislature, became the Montana In-State Investment Act.⁵ The Act became the centerpiece of the “Build Montana Program,” the legislative package proposed by Governor Ted Schwinden and enacted into law in 1983. Other programs included the Economic Development Bond Act,⁶ which this paper will discuss in greater detail, the Montana Capital Company Act,⁷ the Municipal Finance Consolidation Act,⁸ the Montana Health Facility Authority Act,⁹ and the Montana Agricultural Loan Authority Act.¹⁰ In 1985, the Montana Legislature enacted the Science and Technology Financing Act,¹¹ which this paper also will discuss in greater detail.

But even before these programs were enacted as part of a concerted economic-development program, the Montana Legislature had given local governments some economic-development tools. In 1975, it authorized city or county voters to impose upon them-

---

². Id.
³. Mont. Initiative 95, approved November 2, 1982 (codified at MONT. CODE ANN. § 17-6-304 (1989)).
⁴. Id.
⁵. MONT. CODE ANN. §§ 17-6-301 to -331 (1989).
⁹. MONT. CODE ANN. §§ 90-7-101 to -121 (1989).
MONTANA LAW REVIEW

selves for economic-development purposes a tax of one mill for a period not to exceed five years. 12 In 1974, the legislature authorized municipalities to create urban-renewal districts, to use tax-increment financing, to exercise the power of eminent domain and to cooperate with private enterprise for redevelopment of blighted areas within the municipalities. 13 As early as 1965, cities and counties had been given the authority to issue industrial development revenue bonds for various industrial and commercial projects owned by private entities. 14 By issuing such bonds, a local government was able to provide tax-exempt financing, and corresponding lower interest rates, to a private business, if the project to be financed met certain requirements under the federal tax code.

In enacting these programs, Montana was not necessarily forging new ground. Rather, it was making a concerted effort to compete with the economic-development activities being undertaken in other states. As reported in 1988:

[Pennsylvania] . . . created a program using public money as a lure to coax more start-up [companies] . . . . Michigan used small amounts of public money to create incentives for much larger amounts of private investment and tapped public pension money to fund new businesses. . . . Ohio offers matching grants for promising new companies and . . . [t]he state's public pension funds have invested . . . in new ventures . . . . 15

A recent article prepared for the Montana Chamber of Commerce Legislative Action Session concluded "that specific subsidies and tax benefits for this or that firm is the wrong tack—it gets governments and businesses intertwined and distorts incentives." 16 Although some would disagree about the effectiveness and propriety of government's role in economic development, the term public-private partnership has become a buzzword at both the state and local level.

It has become clear in recent years that as states and localities compete for businesses, legislators and other public officials are being called upon to consider, or are themselves proposing, in the name of a public-private partnership, a wide range of possible legislative actions, such as property-tax exemptions, low interest loans

15. Inc., supra note 1, at 79.
or guarantees, grants, sales-tax exemptions, tax-exempt bond financing, eminent domain, tax increments and zoning variations. Recent developments in Montana emphasize that not only must the efficacy and cost-effectiveness of such proposals be considered, but the proposals' constitutionality must be considered as well.

Although it is true that most states have very similar constitutional provisions that bear on the state's ability to undertake economic-development programs, the interpretation of these provisions by the state's highest court may put that state at a disadvantage when competing with other states in economic development. For example, the Montana Supreme Court struck down two fairly recent economic-development programs authorized by the Montana Legislature. The purpose of this paper is to review the decisions of the Montana Supreme Court under both the 1889 and 1972 Constitutions in an attempt to draw some conclusions about permissible economic-development activities for governments in Montana.

Of the several provisions of the 1972 Montana Constitution pertinent to this study, two are of critical importance:

(a) article VIII, section 1 (Public Purpose Clause) provides: "Taxes shall be levied by general laws for public purposes."

(b) article V, section 11(5) (Appropriation Clause) provides: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."

The provision that taxes must be levied for public purposes appeared in article XII, section 11 of the 1889 Constitution; the prohibition against appropriations to entities not under the control of the state formerly appeared in article V, section 35 of the 1889 Constitution. The 1889 Constitution contained another provision (the Loan of Credit Clause) omitted from the 1972 Constitution, apparently because it was considered to be essentially the same as the Public Purpose Clause. Because the Montana Supreme Court often interpreted the Loan of Credit Clause, it also is important to this analysis. The omitted 1889 clause stated that:

Neither the state, nor any county, city, town, municipality, nor any other subdivision of the state shall ever give or loan its credit


19. MONT. CONST. of 1889, art. XIII, § 1.
in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law.20

Although omitted from the 1972 Constitution, this restriction is still imposed on counties by statute, but not on cities.21

A systematic analysis of the Montana Supreme Court’s interpretation of these provisions is handicapped by the court’s periodic failure to discuss separately the application of the separate provisions of the constitution. In addition, the court periodically fails to recognize that a particular decision is at variance with one or more earlier decisions. The following analysis will discuss chronologically the separate provisions of the constitution. This necessarily produces some overlap or repetition because most decisions do, in fact, involve at least two of the separate provisions of the constitution.

II. PUBLIC PURPOSE: PRINCIPALLY A LEGISLATIVE DECISION

Montana courts, as well as courts in other jurisdictions, have endorsed the general proposition that the determination of public purpose is one primarily to be made by the legislature, and one that will not be interfered with unless a clear abuse of power has occurred.22 The presumption of validity and judicial deference to the legislative determination is not always sufficient for a particular law.23 The presumption of validity also requires recognition that the constitution is organic and should be interpreted in light of contemporary circumstances.24

---

20. Id.
22. Lewis and Clark County v. Industrial Accident Bd. of Montana, 52 Mont. 6, 12, 155 P. 268, 271 (1916) (“The power of taxation is a legislative prerogative, and therefore the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissible is for the legislature in the first instance.”). The general rule of constitutional law that courts will indulge every reasonable presumption in favor of legislation applies with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid. See State ex rel. Campbell v. Stewart, 54 Mont. 504, 171 P. 755 (1918); State ex rel. Mills v. Dixon, 66 Mont. 76, 84, 213 P. 227, 229 (1923) (“[t]he constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.”); Stanley v. Jeffries, 86 Mont. 114, 133, 284 P. 134, 139 (1929) (“what is for the public good and what are public purposes are questions which the Legislature must decide upon its own judgment.”).
24. Huber v. Groff, 171 Mont. 442, 448, 558 P.2d 1124, 1127 (1976) (quoting Cotting-
It is interesting that in the two most recent cases in which the court determined the validity of economic-development legislation, the court failed to state expressly this principle of constitutional law. Nonetheless, the principle is so firmly established in so many contexts that its continuing validity cannot be seriously questioned. Perhaps it is fair to observe simply that if the court is upholding a law it will dwell on its deference to the legislative determination of public purpose; if, however, the court is denying the validity of a law, judicial deference to the legislative determination, and the presumption of validity that attaches to the legislation, will receive short shrift.

III. THE PUBLIC PURPOSE CLAUSE

A comprehensive and useful definition of "public purpose" within the meaning of article VIII, section 1 is elusive. Public purpose, in this sense, may resemble art and pornography; it is hard to define, but judges seem to know it when they see it.

In a landmark case, Loan Association v. Topeka, the United States Supreme Court recognized the difficulty in defining public purpose, and it suggested several defining factors:

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest. . . . [I]n deciding whether, in the given case, the object for which the taxes are assessed [public or private], [courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal.

Today the United States Supreme Court has virtually withdrawn from reviewing the legality, under the United States Constitution, of state economic-development laws. The Topeka factors, however, have found their way into many texts and opinions of state supreme courts applying provisions such as the Public Purpose Clause. If public purpose were determined solely by usage, cus-
tom, and long course and acquiescence of the people, then new public programs would be rare indeed. Much more important, then, is the "true test," whether the program is one for the good of the general public as distinguished from individual gain and private objects.\textsuperscript{30} In Stanley \textit{v. Jeffries}, the Montana Supreme Court stated that a public purpose may be found in a program that is for the general good of the inhabitants, satisfying their need or "contribution to their convenience."\textsuperscript{31} Quite clearly, convenience goes beyond necessity.

When a court is faced with a determination of whether a particular purpose or use is a public purpose or use, the reason almost always centers on the legislation at hand benefitting, directly or indirectly, a particular class or segment of the public more than it is benefitting others. Quite clearly, private benefit is not a sufficient basis for invalidating legislation. For example, in \textit{State ex rel. Cryderman v. Wienrich},\textsuperscript{32} the court upheld the 1915 Seed Grain Law under which a county could make loans to needy farmers to purchase seed grain. Recognizing that the loans aided farmers in their private business, the court said:

If [the] object is to foster private enterprises and the only benefit to be derived by the public is incidental and secondary, then the [constitutional] restrictions apply, and the credit or donation may not be granted; but if the primary object is to prevent a class of needy citizens from becoming a permanent public charge, the fact that their own efforts and self-respect are called in to aid the design cannot make it the less a public one.\textsuperscript{33}

The nexus between the Public Purpose Clause and the Appropriation Clause is unclear. No immediate, necessary connection exists between the two provisions. Moreover, the court has not often addressed specifically the relationship between the two provisions. Several times, however, the court has equated the two provisions.\textsuperscript{34} In addition, the court often has equated the principles of the two provisions with the provisions of article XIII, section 1 of the 1889 Constitution.

whether the work to be done is essentially public and for the general good of the inhabitants, satisfying their needs or contributing to their convenience, rather than merely for gain or for private objects."\textsuperscript{30}.

30. \textit{Id.}
31. \textit{Id.}
32. 54 Mont. 390, 170 P. 942 (1918).
33. \textit{Id.} at 398, 170 P. at 946; 15 \textsc{McQuillan}, \textsc{The Law of Municipal Corporations} (3d ed. 1985) [hereinafter \textsc{McQuillan}]; \textsc{Rhyne}, \textsc{Law of Local Government Operations} 1723 (1980).
34. \textit{See, e.g., State ex rel. Normile v. Cooney, 100 Mont. 391, 47 P.2d 637 (1935).}
IV. THE APPROPRIATION CLAUSE

Both the 1889 Constitution and the 1972 Montana Constitution contain nearly identical appropriation clauses.\(^{35}\) The proceedings of the constitutional convention make it apparent that the changes in language from the 1889 Constitution to the 1972 Constitution were not considered particularly significant. In *Huber v. Groff*,\(^{36}\) the court noted the difference in language and said: "The Convention Notes indicate there was no change between the new and the old provision except as to grammar. It must then be assumed the 1972 Montana Constitution expresses the intent of the framers more precisely.\(^{37}\) Consequently, it must be assumed that the pre-1972 cases are appropriate for consideration in applying the provision of the 1972 Constitution.

An early case suggests the Appropriation Clause does not apply to local units of government.\(^{38}\) In *Cryderman*, the court was asked to enjoin county commissioners from holding a special election under the Seed Grain Law.\(^{39}\) The plaintiff argued the law violated the Appropriation Clause, to which the court replied: "Section 35 of Article V has no relevancy here; it is addressed to the legislature, and no appropriation by the legislature for any purpose is involved.\(^{40}\)

The Montana Supreme Court often has treated an Appropriation Clause challenge as if it were a challenge to the Public Purpose Clause.\(^{41}\) For example, in *State ex rel. Normile v. Cooney*,\(^{42}\) the plaintiff sought to enjoin the State Water Conservation Board from proceeding with the construction of an irrigation and flood control project in Carbon County.\(^{43}\) The board proposed to issue its bonds, payable from the revenues of the project, consisting gen-

---

35. Article V, section 11(5) of the 1972 Montana Constitution states:
No appropriation shall be made for religious, charitable, industrial, educational or benevolent reasons to any private individual, private association or private corporation not under control of the state.

Article V, section 35 of the 1889 Montana Constitution states:
No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

37. Id. at 456, 558 P.2d at 1131-32.
38. State ex rel. Cryderman v. Wienrich, 54 Mont. 390, 170 P. 942 (1918).
39. Id. at 391, 170 P. at 943.
40. Id. at 398, 170 P. at 946.
42. 100 Mont. 391, 47 P.2d 637 (1935).
43. Id. at 394-95, 47 P.2d at 639.
erally of amounts received from the sale of water to a local water users’ association, which would take title to the project after the bonds had been paid. The plaintiff based his challenge on the Appropriation Clause, but the court based its analysis on whether the purpose of the Act was a public purpose. The court cited provisions of the constitution stating that the use of water within the state shall be a public use. As to the application of the Appropriation Clause, the court said simply: “The purpose of the appropriation above referred to is for a public use. The water conservation board is created by law. It is an agency of the state. It is under the control of the state; hence the contention here made cannot prevail.” It is not clear if the appropriation of which the plaintiff complained was the appropriation to the State Water Conservation Board, in which case the court’s statement was appropriate and sufficient. If, however, the appropriation to the water users’ association was by virtue of the benefits that the association would derive from the construction of the project, then the court’s response was inappropriate and insufficient. Consequently, the court left open the question whether a statute deemed to be an appropriation of money directly to a person not under control of the state would be permissible as long as the purpose was a public one.

If private individuals receive a benefit incidental to a public program, it does not automatically violate the Appropriation Clause. For example, in Douglas v. Judge, a taxpayer challenged the constitutionality of a 1975 law authorizing the issuance of general-obligation bonds of the state, the proceeds of which were to be used by the Board of Natural Resources and Conservation to finance renewable resource projects through grants to public agencies, and loans to public agencies, farmers and ranchers. The court held that portion of the law authorizing loans to farmers and ranchers invalid, because the law failed to provide sufficient guidelines for the Board to use in evaluating projects for which it received loan applications. Addressing the applicability of the

44. Id. at 396, 47 P.2d at 640.
45. Id. at 407-08, 47 P.2d at 645-46.
46. Id. at 408, 47 P.2d at 646.
47. Id. at 408, 47 P.2d at 646. See also Veterans’ Welfare Comm’n v. VFW, 141 Mont. 500, 509-10, 379 P.2d 107, 111 (1963).
48. Grossman v. State Dep’t of Natural Resources, 209 Mont. 427, 455-56, 682 P.2d 1319, 1334 (1984) (“as long as the provision relating to the expenditures of the funds derived from the proceeds of the bonds are under the control of the state, the constitutional mandate is satisfied.”).
50. Id. at 34-35, 568 P.2d at 531-32.
51. Id. at 40, 568 P.2d at 535.
Appropriation Clause, however, the court stated:

Initially it is important to recognize that the funds in question herein are not appropriated for the use of private persons, corporations or associations. The funds are appropriated for the use of the Department of Natural Resources and Conservation. This department is then in turn directed by the... act to dispose of these funds as directed by this act. ... Total control over the granting of these loans is vested in the Department. ... We hold that sufficient control over the appropriated funds is vested in the state....

It is important to note that the court deemed the Appropriation Clause satisfied even with regard to the loans to farmers and ranchers.

V. Article XIII, Section 1: The Loan of Credit Clause

Under the 1889 Constitution's Loan of Credit Clause, the state and municipalities could not "give or loan... credit" or give or donate funds to any private individual, company or corporation:

Neither the state, nor any county, city, town, municipality, nor any other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or a joint owner with any person, company or corporation, except as to such ownership as may accrue to the state by operation or provision of law.

Apparently the 1972 Constitution omitted this section because it was considered unnecessary or redundant in light of the provisions of the Public Purpose Clause. The Revenue and Finance Committee explained in its committee report the omission to the constitutional convention: "The [Loan of Credit Clause] is essentially a public purpose question. The Montana Supreme Court has equated the two concepts in its numerous interpretations of the 'lending of credit clause.'" In fact, the language of the 1889 Loan of Credit Clause seems closer to the language of the Appropriation Clause than to the Public Purpose Clause. Perhaps, then, the 1972 delegates thought that in light of both the Appropriation Clause and the Public Purpose Clause, it was not necessary to retain the

52. Id. at 37-38, 568 P.2d at 533.
53. MONT. CONST. of 1889, art. XIII, § 1.
54. Id.
55. See II MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 583 (1972).
Loan of Credit Clause. In either event, and because no intent existed to repeal or to do away with the object of that section, it is appropriate to review the cases interpreting that section.

An early case indicated that a public purpose was not sufficient to overcome an attack based on the Appropriation Clause or Loan of Credit Clause. In *Hill v. Rae*, the court upheld the basic provisions of the 1915 Farm Loan Act, under which the state issued its bonds to finance loans to farmers. The bonds were secured by mortgages on the farm lands of the borrowers and by a guaranty fund to which the state appropriated $20,000. Under the appropriation and loan of credit clauses, the court found the guaranty fund provision invalid, stating: "It will not suffice to say that, the general purposes of the Act being to foster agriculture, and thus to promote the public welfare, such purpose is a public one . . . money for them may not be appropriated unless the specific objects are under the absolute control of the state." 58

Two years later, however, when it upheld the 1915 Seed Grain Law under which counties could issue general-obligation bonds to fund seed-grain loans to needy farmers, the court indicated that public purpose could overcome an attack on the Loan of Credit Clause. In *Cryderman*, the court found that a provision of aid to needy farmers to prevent them from becoming paupers and requiring state relief constituted a public purpose. The plaintiff complained that because the seed grain aided the farmers in their business the law violated the Loan of Credit Clause, but the court rejected this complaint, saying that as long as the primary purpose served the public, the private benefit did not defeat the validity of the provision. Further, the court ruled the Appropriation Clause irrelevant because the Appropriation Clause was "addressed to the Legislature, and no appropriation by the Legislature for any purpose [was] involved." Interestingly, the court did not cite to *Hill*.

Two months later, in *State ex rel. Campbell v. Stewart*, the court upheld the War Defense Act, which authorized the state to issue its general-obligation bonds to fund a program of loans to farmers to encourage and to assist the production of food as part
of the war effort. The court easily dismissed the claim that the law violated the Appropriation Clause when it stated: "This is manifestly not such an appropriation, and the mere fact that the moneys may be effective through individuals, associations or corporations in certain ways does not make it so." For this proposition the court cited Cryderman. But, of course, the Cryderman court had found the Appropriation Clause inapplicable because it involved a county rather than the state. Thus, it is somewhat less than "manifest" why this was not an appropriation subject to the Appropriation Clause. As for the Loan of Credit Clause, the court found the primary public purpose sufficient, saying whether a loan, extension of credit, or donation exists is only secondary; the true purpose is the "most public one that could well be imagined," the defense of the country. Although loans or gifts may be employed to that end, "the outstanding and controlling public purpose is the end that justifies and validates the means." The court cited Hill, but did not distinguish its earlier statement that a public purpose could not overcome the Loan of Credit Clause.

After World War I, veterans needed help, not farmers. In 1922, voters approved by referendum a 1921 law authorizing a payment to each World War I veteran of ten dollars for each month of service, not to exceed two hundred dollars, which would be paid from proceeds of general-obligation bonds of the state. The Montana Supreme Court held the law unconstitutional in State ex rel. Mills v. Dixon. The court reasoned that the state had no legal obligation to pay its veterans, and any obligation existing was a "so-called moral obligation," which was not sufficient to overcome constitutional prohibitions. Although this decision was later overruled, the Dixon court noted, "[P]ublic money cannot be used to pay a gratuity to an individual when he is without legal claim to the money, and when it cannot fairly be said that the public good will be served by such payment ...." This suggests that even if the state is not legally obligated to make the payment, this law will

64. Id. at 507, 171 P. at 756.
65. Id. at 509, 171 P. at 757.
66. Id.
67. Cryderman, 54 Mont. 398, 170 P. at 946.
68. Campbell, 54 Mont. at 510, 171 P. at 757.
69. Id.
70. Id. at 509, 171 P. at 757.
71. 66 Mont. 76, 213 P. 227 (1923).
72. Id. at 94, 213 P. at 233.
74. Dixon, 66 Mont. at 94, 213 P. at 233.
be upheld if the basis for the payment is a public good, such as assistance to temporarily unemployed veterans.\textsuperscript{75}

The court addressed appropriations to veterans again in \textit{Veterans Welfare Commission v. VFW}.\textsuperscript{76} The legislature had appropriated six thousand dollars per year from the general fund to the state’s Veterans Welfare Commission for “\textquote{p}ayment of secretarial services to those veterans’ organizations maintaining full-time service offices at Fort Harrison . . . .”\textsuperscript{77} Two veterans’ organizations maintained such offices.\textsuperscript{78} The court stated that on its face the law seemed to violate both article V, section 35, as an appropriation to a corporation not under the control of the state, and the Loan of Credit Clause, as a donation or grant to a corporation.\textsuperscript{79} The veterans’ organizations argued, on the strength of the \textit{State ex rel Graham v. Board of Examiners} decision,\textsuperscript{80} that legislation on behalf of veterans served a public purpose.\textsuperscript{81} The court said it would assume a public purpose, but that was not sufficient under the Loan of Credit Clause.\textsuperscript{82}

\textit{Fickes v. Missoula County}\textsuperscript{83} was the last case interpreting the Loan of Credit Clause before it was dropped from the 1972 Constitution. Pursuant to the 1965 Industrial Development Bond Act,\textsuperscript{84} Missoula County proposed to issue its revenue bonds in the

\textsuperscript{75} In fact, thirty years later, in \textit{State ex rel Graham v. Board of Examiners}, 125 Mont. 419, 438, 239 P.2d 283, 294 (1952), the court expressly overruled \textit{Mills}. The issue was essentially the same; the voters (in 1950) authorized payment of “an honorarium, or adjusted compensation” to each veteran of World War II. \textit{Id.} at 422, 239 P.2d at 286. Interestingly, the basic amount payable in 1950 was the same as in 1922, \$10 per month of military service. \textit{Id.} The Court said “that a public purpose is served by legislation on behalf of veterans is now so thoroughly established that there can be no further debate.” \textit{Id.} Mills \textit{v. Stewart} overruled the proposition that a moral obligation is not sufficient to support an appropriation of public money as held in \textit{Mills v. Dixon}. In fact, in \textit{Stewart} the court had distinguished, not overruled \textit{Dixon}, because the appropriation in \textit{Stewart} paid a legal debt owed by the state. Lest there should be any doubt, however, the court added, “That part of \textit{Dixon} in conflict with the views herein expressed is expressly overruled.” \textit{Id.} at 438, P.2d at 294. One is left to wonder what part of \textit{Dixon} is not overruled.

\textsuperscript{76} 141 Mont. 500, 379 P.2d 107 (1963).

\textsuperscript{77} \textit{Id.} at 502, 379 P.2d at 108.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} at 507, 379 P.2d at 110.

\textsuperscript{80} 125 Mont. 419, 438, 239 P.2d 283, 294 (1952). For a discussion of \textit{Graham}, see \textit{supra} note 75.

\textsuperscript{81} \textit{Id.}


\textsuperscript{83} 155 Mont. 258, 470 P.2d 287 (1970).

\textsuperscript{84} \textit{MONT. CODE ANN.} §§ 90-5-101 to -305 (1989).
amount of fourteen million dollars to finance the acquisition and installation of certain air and water pollution control facilities at the pulp and paper mill of Hoerner Waldorf Corporation.\(^6\) The county would own the financed facilities but lease them to the corporation.\(^8\) The bonds of the county were not a general obligation, but were payable solely from the lease payments to be received from the corporation. In response to the claim that the law violated the Loan of Credit Clause, the court noted that the test "whether a donation or grant is prohibited . . . is whether the donation or grant is for a public purpose."\(^8\) Curiously, the court then stated: "Thus, here,since no debt or liability is created, we look to see if an indirect benefit to the industry by having a favorable type of financing [tax exampt financing], will condemn the Act in question."\(^8\) The court did not explain the significance of the absence of a debt or liability. The county had found the project would increase employment, "protect the health, safety and welfare" of its citizens and improve the environment.\(^9\) Thus, said the court, "a valid purpose appears."\(^9\) The court discussed prior decisions and stated, "The mere incidental benefits to a private corporation do not change a public purpose to a private one being the loaning of credit or aid as prohibited."\(^9\) Although the court found no violation of the Loan of Credit Clause, it left unanswered the puzzling and crucial question of whether a similar public purpose would be sufficient if the "aid" or incidental benefit to a private party involved a use of tax funds or proceeds of general-obligation bonds of the governmental unit.

VI. THE RECENT CASES: White v. State and Hollow v. State

With this judicial history, little question remains that the court must continuously be consulted about what constitutes a violation of the public purpose and appropriation clauses. This question most frequently has been presented to the court in cases involving the issuance of bonds by the state or one of its agencies or political subdivisions, because the tax-exempt bond market generally requires that an "unqualified" opinion of bond counsel be fur-

\(^{85}\) Fickes, 155 Mont. at 260-61, 470 P.2d at 288.
\(^{86}\) Id. at 261, 470 P.2d at 288.
\(^{87}\) Id. at 267, 470 P.2d at 291 (quoting Willett v. State Bd. of Examiners, 112 Mont. 317, 322, 115 P.2d 287, 289 (1941)).
\(^{88}\) Id. at 267-68, 470 P.2d at 291-92 (emphasis added).
\(^{89}\) Id. at 268, 470 P.2d at 292.
\(^{90}\) Id.
\(^{91}\) Id. at 269, 470 P.2d at 292.
nished for issues of tax-exempt municipal bonds. Bond counsel firms, however, generally are comfortable in rendering such an opinion only if the highest court in the state has ruled affirmatively on all constitutional issues raised by the new legislation or has previously ruled on similar legislation. Thus, if uncertainty exists, bond counsel usually will require a "test case," in which all conceivable constitutional challenges to the particular piece of new legislation is put before the court for resolution before the bonds can be sold. It was under these circumstances that the Montana Supreme Court addressed the public purpose and appropriation issues in White v. State92 and Hollow v. State.93

In 1983, the legislature enacted the Montana Economic Bond Act94 (the Bond Act), as part of the "Build Montana Program." This Act gave the newly created Montana Economic Development Board the same authority earlier granted to cities and towns to issue industrial development revenue bonds.95 The Economic Development Board had been created principally to invest the "In-State Investment Fund" created by Initiative 95 and the In-State Investment Act.

The bonds issued by the Board under the 1983 law were payable solely from revenues provided by the parties to whom the Board lent the proceeds of the bonds. Thus, they essentially were the same as the revenue bonds issued by Missoula County and upheld by the court in the Fickes case.96 In 1985, the legislature authorized the Board, by a somewhat convoluted law, to guarantee its revenue bonds by payments from the In-State Investment Fund in an effort to make the bonds more marketable and to reduce the effective interest rate of the loans to the private businesses.97 The bill amended the In-State Investment Act to provide that, for purposes of the Act, "investment" includes the "guaranty of loans or bonds in consideration [of] a fee" and specifically authorized the use of the In-State Investment Fund to guarantee either the loans or the economic-development bonds issued by the Board.98 As another mechanism for enhancing the creditworthiness of the bonds, the Bond Act also allowed the Board to loan the In-state Investment Fund to the extent of the capital reserve account and the

96. Fickes, 155 Mont. 258, 470 P.2d 287.
97. 1985 Mont. Laws 640 (codified at MONT. CODE ANN. §§ 17-5-505 to -06, -6-308, -311, -315 (1989)).
98. Id. at § 3 (codified at MONT. CODE ANN. § 17-6-308 (1989)).

Published by The Scholarly Forum @ Montana Law, 1990
guaranty.99 The maximum amount of the guaranty was limited by law to three million dollars to an individual project.100 As previously indicated, the In-State Investment Fund is derived principally from coal severance taxes.101 Thus, although the bonds issued by the Board were revenue bonds, as in Fickes, the bonds also would be secured by a guaranty funded from taxes.

Hollow v. State102 tested the constitutionality of the augmented Bond Act and the Public Purpose Clause and the Appropriation Clause again came before the court. The court, troubled by the concept embodied in the new law that a "guaranty" constituted an "investment," nonetheless seemed to accept the proposition for purposes of the decision. The court found the augmented Act unconstitutional, however, because the money in the In-State Investment (derived from coal severance taxes) was used to "satisfy guaranties of private debts or obligations."103 and therefore violated the Public Purpose Clause and the Appropriation Clause.

The court cited Veterans Welfare Commission v. VFW,104 as authority for its holding, which invalidated the use of public funds to pay the salary of the secretaries of two veterans' organizations.105 The court did not question (indeed, did not even discuss) whether, through the issuance of its revenue bonds, the Board might achieve the purposes for which the issuance of such bonds had been authorized—promoting the general welfare, increasing job opportunities, retaining existing jobs, and generally enhancing economic development—nor did the court question that those public purposes might be better achieved by reason of the guaranty device.

Although the court did not specifically address whether the purpose of the amended Bond Act (development of business) was a public purpose, it held that coal taxes could not be used as contemplated.106 In doing so, the court may have implicitly acknowledged that although a use of funds may be for a public purpose, it is not a public purpose for which taxes can be levied. In Fickes, the court held that the issuance of industrial development revenue bonds was a public purpose for purposes of both the Appropriation

99. Id. (codified at MONT. CODE ANN. § 17-6-308(3) (1989)).
100. Id. (codified at MONT. CODE ANN. § 17-6-308(2) (1989)).
103. Id. at 485, 723 P.2d at 232.
105. Hollow, 222 Mont. at 485-86, 723 P.2d at 232.
106. Id.
Clause and the Loan of Credit Clause.\textsuperscript{107} The benefit a private company obtained from the issuance of such bonds did not invalidate the public purpose of the program in \textit{Fickes}.\textsuperscript{108} It seems clear, however, that the court’s finding of public purpose in \textit{Fickes} depended on its finding that no tax dollars were being used to benefit private entities.\textsuperscript{109} In addition, recall that in \textit{Hill} the issuance of revenue bonds to make loans to farmers was a public purpose, but using tax dollars to guarantee those bonds violated the Appropriation Clause.\textsuperscript{110}

In \textit{Hollow}, the court distinguished \textit{Huber v. Groff} on the basis that in that case the bonds were revenue bonds and did not include a pledge of credit of the state, but only a “moral commitment” that the governor would request the legislature to appropriate necessary funds to supplement the accounts for payment of the bonds.\textsuperscript{111} That technique, said the court, “is still open under this decision. What we do not and cannot condone is the direct use of tax monies by legislative provision which in effect directly pledges the credit of the state to secure the bonds involved in this case.”\textsuperscript{112}

One wonders why the “moral obligation or commitment,” which if implemented would involve the direct appropriation of tax dollars to pay for the bonds, is permissible under the public purpose and appropriation clauses, but the pledge of tax dollars to guaranty the bonds is not. Assuming the purpose is a public one, the purpose of both would be the same. As one scholar has noted, “[I]n determining what is a public purpose, it is not material whether the question arises in connection with (1) expending monies on hand, (2) creation of floating indebtedness, (3) creation of bonded indebtedness or (4) levy of taxes.”\textsuperscript{113} \textit{Hollow} left critical questions unanswered.

In 1985, the legislature enacted the Science and Technology Development Board Seed Capital Bond Act (the Technology Act).\textsuperscript{114} In doing so, the legislature hoped that technology investments would strengthen and diversify the economy of the state, accelerate technological development, and create new jobs and bus-

\textsuperscript{108} \textit{Id.} at 268, 470 P.2d at 291-92.
\textsuperscript{109} The court stated, “Here every dollar expended on the bond issue is to be repaid from and by the project the issue makes possible . . . . Thus, a valid purpose appears.” \textit{Id.} at 268, 470 P.2d at 292.
\textsuperscript{110} 52 Mont. 378, 158 P. 826 (1916).
\textsuperscript{111} 222 Mont. at 486, 723 P.2d at 232.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} MCQUILLAN, \textit{supra} note 33, § 39.19 at 38.
\textsuperscript{114} MONT. CODE ANN. §§ 90-3-101 to -525 (1989).
The Technology Act created a Science and Technology Development Board and authorized it to issue bonds, the proceeds of which would be used to make investments in seed capital, start-up capital, and expansion capital projects for qualifying science and technology companies. The proceeds also were to be used to invest in "certified Montana capital companies" making technology investments. The bonds of the Board would be payable from income received by the Board from its investments and from the coal severance tax.

In White v. State, another test case, taxpayers sued for a declaratory judgment as to the constitutionality of the Act. The plaintiffs argued first that the Act violated the Appropriation Clause "because those investments ultimately benefit private individuals not under control of the state." In support of this proposition plaintiffs cited Hollow and Hill. The Board, however, citing Grossman v. State Department of Natural Resources and Huber v. Groff, argued that because the appropriations by the legislature were to the Board, a public agency, no violation of the Appropriation Clause occurred. The court, after indicating its analysis would be based on post-1972 decisions, summarized its holdings in Huber and Grossman. However, the court held that the principle of those cases—that appropriations to public entities for a public purpose were constitutional even though money might ultimately benefit private individuals or businesses through its use by the state agency—limited by the decision in Hollow.

As to the Hollow case, the court said:

We held that the use of state tax revenues to secure the private obligations of project participants and the bonds providing funds for the benefit of their businesses violated . . . the Montana Constitution. We distinguished Huber in that the legislation in Huber specifically did not pledge the credit of the state to secure the bonds being issued. The Hollow legislation in effect directly pledged the credit of the state to secure the bonds and guaranties being used to benefit private business ventures.
The court acknowledged that funds initially appropriated to the Board would be appropriated to an entity under the control of the state within the meaning of the Appropriation Clause. 126 “However, the significance of this argument would diminish greatly once bonds were issued.” 127

The court then described the procedure by which the state’s coal severance tax would be transferred to pay debt service on the bonds if the returns on the investment and other available funds were inadequate. 128 Presumably this appropriation, because it pledges the credit of the state to secure the bonds issued by the Board, the proceeds of which are used for the benefit of private business,” is the appropriation that violates the Appropriation Clause. 129 The court did not address the question of whether the invalid appropriation could be offset by a public purpose.

VII. CONCLUSION

It seems fairly clear that in the abstract, within the meaning of the provisions of the Montana Constitution, a particular program or activity is likely to be considered a public purpose that justifies or permits some level or type of public funding if the program or activity has one or more of the following characteristics:

1. It has traditionally been conducted by government.
2. It cannot be conducted as effectively by the private sector or without the government sponsorship.
3. It benefits primarily or directly all citizens or a general class or segment of citizens; a public purpose is more easily found if the benefits are not principally in the business activities of the benefited class.
4. The program or activity is reasonably related to the intended benefit.

At first blush, it seems curious to speak of public purpose in a context other than that of the Public Purpose Clause. Of the three sections discussed here, only the Public Purpose Clause expressly refers to public purpose. Neither the Appropriation Clause nor the Loan of Credit Clause of the 1889 Constitution refers to public purpose. But the outcome of cases litigating both of those sections repeatedly refer to and are based upon public purpose.

Thus, in State ex rel. Campbell v. Stewart the court could say

126. Id.
127. Id.
128. Id. at 87, 759 P.2d at 974.
129. Id.
that, notwithstanding that proceeds of general-obligation bonds of the state would be loaned to farmers for use in their business of farming, the "outstanding and controlling public purpose" of promoting agricultural production to support the war effort "is the end that justifies the means." The State ex rel. Cryderman v. Wienrich case, involving loans by counties to needy farmers from proceeds of general-obligation bonds of the counties, stands for the same proposition with stronger language: "If the act under consideration is not violative of the one [i.e., the Public Purpose Clause] it is not violative of the other [i.e., the Loan of Credit Clause]." And as the Willett v. State Board of Examiners case holds: "The test to be adopted in determining whether a donation or grant is prohibited under [the Loan of Credit Clause] is whether the donation or grant is for a public purpose."

Although these cases have not been overruled or discredited, a number of cases seem to contradict them. In the Veterans Welfare Commission v. VFW case, the court said that even though an entity's use of funds is for a public purpose, if the entity is not under the control of the state a gift to the entity is forbidden by the Appropriation Clause.

To be sure, in a few cases the court has resolved the dilemma or finessed the question by finding that although the public funds are ultimately used by private parties for their business purposes, the appropriation of public funds is to a public entity—controlled by the state—and therefore no impermissible gift or appropriation exists. State ex rel. Normile v. Cooney, Douglas v. Judge, and Grossman v. State Department of Natural Resources all are based on this analysis, but the more recent decisions in Hollow v. State and White v. State refuse this analysis, looking instead to the ultimate use of funds.

It is logically difficult to accept the proposition that whether a program or activity serves a public purpose and does not constitute an impermissible appropriation to an entity not under the control of the state depends upon whether the particular program or activity is funded by taxes or by non-tax sources. But in light of the

130. 54 Mont. 504, 510, 171 P. 755, 757 (1918).
131. 54 Mont. 390, 170 P. 942 (1918).
134. 100 Mont. 391, 47 P.2d 637 (1935).
decisions discussed in this paper, the truth of the proposition seems inescapable. Consider the *Hill v. Rae* case, which dealt with a farm-loan program funded by revenue bonds enhanced by a guaranty fund of tax dollars.\(^{139}\) The court upheld the program as a public purpose, but struck down the guaranty fund.\(^{140}\) Compare *Huber v. Groff*\(^{141}\) with *Hollow v. State*.\(^{142}\) In *Huber*, the court upheld the state Housing Act, under which the Board of Housing would fund its housing programs from proceeds of bonds payable from non-tax revenues of the programs.\(^{143}\) The bonds also were secured by a "moral obligation pledge," which obligated the governor to include in his budget, for consideration by the legislature, any appropriation necessary to make up any deficit in revenues available for debt service on such revenue bonds.\(^{144}\) In *Hollow*, the court struck down a law authorizing the Board of Investments to pledge coal severance taxes to make up any deficiency in revenues available to pay debt service on revenue bonds the proceeds of which were used to fund economic development loans.\(^{145}\) In *Huber*, then, a housing program supported by revenue bonds and a "moral obligation [contingent] pledge" of taxes was upheld, while in *Hollow* an economic-development program supported by revenue bonds and a pledge of coal severance taxes was struck down.

The court has not yet acknowledged expressly what seems to be implied by its decisions, that there may be two levels, or tiers, of public purpose. The first tier is so clear and definite that in its pursuit tax dollars may be pledged and used. The other is less clear, perhaps less demanding of government action, perhaps involving a greater degree of private benefit, in pursuit of which tax dollars cannot be spent or pledged but other, non-tax revenues may be spent or pledged.

It is confusing, at best, to have the court suggest that the economic-development programs enacted in *Hollow* and *White* were not for a public purpose, when a very similar economic-development program (retention or increase in employment opportunities, additional taxes, increased economic activity) was upheld in *Fickes*. It seems disingenuous of the court to find, as it did in *Hollow* and in *White*, impermissible appropriations to private parties not under control of the state, when in *Douglas* and *Grossman*

\(^{139}\) 52 Mont. 378, 158 P. 826 (1916).
\(^{140}\) *Id.* at 389-90, 158 P.2d at 831.
\(^{141}\) 171 Mont. 442, 558 P.2d 1124 (1976).
\(^{142}\) 222 Mont. 478, 723 P.2d 227 (1986).
\(^{143}\) *Huber*, 171 Mont. at 461, 558 P.2d at 1134.
\(^{144}\) *Id.* at 451-52, 558 P.2d at 1129.
\(^{145}\) *Hollow*, 222 Mont. at 486-87, 723 P.2d at 232-33.
the court held the appropriations were to the state agency that allocated the money to the private parties. Unless the court is prepared to retreat from *Hollow* and *White*, to allow the use of tax money in support of economic-development programs which also benefit private businesses, it would be helpful if the court at least would fully articulate its concept of two tiers of public purposes.