



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE August 23, 2021

TO Joint Travel, Recreation, Wildlife and Cultural Resources Interim Committee

FROM John Brodie, Staff Attorney

SUBJECT State constitutionality of potential film incentive legislation

A. Introduction

The purpose of this memorandum is to discuss whether the creation of a Wyoming film production incentive program that appropriates public funds to be used to incentivize private businesses would be prohibited under the Wyoming Constitution. As will be discussed below, there are constitutional provisions that may be raised concerning whether such a program would be constitutional. However, such inquiries likely could be minimized by ensuring that any film production incentive program (1) clearly serves a public purpose; and (2) makes certain that the State receives adequate consideration in return for any incentives being offered under the program.

This memorandum is preceded by prior LSO research that examined the constitutionality of certain film incentive legislation. The analysis from the prior research is similar to that offered herein, though the research is distinguishable because this memorandum discusses the relevant constitutional principles and provisions that would generally apply to potential film incentive legislation.

B. Discussion

1. Requirement of a Public Purpose

"[I]t is elementary that the legislature cannot levy a tax or make an appropriation except only for public purposes, and this is true whether the constitution so expressly provides or not."¹ The public purpose to be served must be more than incidental.² But there is no absolute judicial definition of a "public" as distinguished from a "private" purpose; although an equally divided Wyoming Supreme Court noted that, if "the legislative judgment as to a 'public purpose' is apparent, that judgment will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest

¹ *State v. Carter*, 30 Wyo. 22, 29 (Wyo. 1923).

² 63C Am. Jur. *Public Funds*, § 3, p. 227 (1997); see *Vill. of Moyie Springs v. Aurora Mfg. Co.*, 353 P.2d 767, 773 (1960) (holding that "an incidental or indirect benefit to the public [cannot] transform a private industrial enterprise into a public one, or imbue it with a public purpose.").

and welfare."³ It is conceivable that the definition of "public purpose" may depend on the particular facts and circumstances of the case.

With respect to the creation of film production incentive program, a potential public purpose to be served could be economic development for the state, not only with the possible benefits that would accrue through the film and television production companies' presence—e.g. job creation, sales and use tax revenues, lodging tax revenues, etc.—but through second order effects such as an increased profile for Wyoming within the film and television industry, the tourism industry and the visitor economy. But simply spending for a public purpose does not mean the spending is constitutionally compliant. No matter how apparent it may be that a legislative action serves a public purpose, that will not validate an act that is otherwise unconstitutional.⁴

2. Prohibitions Against Donations and Appropriations for Charitable or Benevolent Purposes

It is prudent to discuss relevant state constitutional provisions governing the appropriation of state funds. First, Article 16, Section 6 of the Wyoming Constitution, which prohibits specific funding to individual entities:

Loan of credit; donations prohibited; works of internal improvement.

Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall . . . loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor . . .

Second, Article 3, Section 36, which prohibits appropriating state funds for general benevolent and other purposes:

Prohibited appropriations.

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.

Article 16, Section 6 prohibits donations by state and political subdivisions except for the necessary support of the poor. The "donations" clause has been addressed on several occasions in Wyoming jurisprudence. The case law might viewed as an evolving liberalized reading of Article 16, Section 6, or perhaps the result of fact specific determinations.

In 1915, Carbon County appropriated \$2,000 to a county fair association, which was a private corporation. The appropriation was authorized under state law if the association met certain criteria, including being organized for the development of county resources and having expended funds on improvements. The Wyoming Supreme Court held the appropriation and the statute unlawful; the appropriation was "unquestionably a donation by the county" in aid of a corporation. The Court stated the conflicts between the statute and the constitutional provision were "apparent and direct."⁵

³ *Uhls v. State*, 429 P.2d 74, 86–87 (Wyo. 1967). Although the Wyoming Supreme Court has not expressly overruled *Uhls*, its precedential value may be limited based on *Uhls* being an equally divided opinion (four members split two and two, resulting in an automatic affirmance). See *Witzenburger v. State*, 575 P.2d 1100, 1116 n.21 (Wyo. 1978).

⁴ See generally *Witzenburger*, 575 P.2d 1100, 1135-36.

⁵ *Bd. of Cty. Comm'rs v. Union Pac. R.R.*, 171 P. 668 (Wyo. 1918).

Progressing to 1923, when an under-sheriff was killed in the performance of his duties, the auditor refused to pay the amount appropriated for the officer's widow and questioned the validity of the law as a donation of public money. The Court did not directly address the question as to what the Legislature may or may not do by way of making an appropriation to a person simply because he may be poor, other than noting that the prohibition on donations cannot be nullified by the simple claim that the recipient is poor—there must be a public benefit. The Court noted that the Constitution does not define "gift" or "donation," nor does it prohibit the recognition of a moral claim or obligation, as opposed to a legally enforceable claim. The Court held the Legislature was not unwarranted in recognizing the death gave rise to a moral obligation that it had the right to recognize by an appropriation of money. Thus, the appropriation was for a public purpose in fulfillment of a moral obligation and was not a donation. According to the Court: "Law is a progressive science. It is the beauty and boast of the common law, that it is able to adapt itself to the changing conditions and requirements of our society. Our constitution was adopted in light of that fact."⁶

Jumping forward to 1943, the Court was confronted with a claim that the unemployment compensation system violated Article 16, Section 6. According to the challenger, the payments being made were mere donations, which may be made to the poor, but not everyone receiving those payments necessarily was poor. The Court rejected the claim, holding that the Legislature had the right to take into consideration the difficulties which may be encountered in administration of the act. Most unemployed industrial workers would most likely be in need and to condemn the whole act because isolated payments might be a gratuity did not seem reasonable to the Court.⁷

By 1959, the county fair issue had returned to the Court. This time however, the appropriation was to a county fair board appointed by the county commissioners. The Court recognized the public purpose in operating fair grounds, etc., but that alone apparently was not sufficient grounds upon which to base its holding affirming the action. The Court determined that the county fair board, while being an entity separate from the county with authority to sue and be sued, was a separate municipal or quasi-municipal corporation operating as an agency of the state. Since the donations prohibition applied to private entities, and the county fair board was a state agency, the appropriation did not violate the Constitution.⁸

3. Requirement for Adequate Consideration

In 1977, the Court was faced with another challenge implicating Article 16, Section 6, this time with respect to the prohibition against the government loaning or giving its credit in aid of any individual, association or corporation. The case involved the city of Cody joining into an agreement organizing the Wyoming Municipal Power Agency. Under the agreement each party agreed to make up deficiencies created by a defaulting party. This aspect was attacked as a lending of credit. The Court noted that while participants agreed to make good on deficiencies, they also received a pro rata share of the systems' entitlements. This neutralized the concept of giving or lending credit since something was received in return. The Court held:

⁶ *Carter*, 215 P. 477 at 483.

⁷ *Unemployment Comp. Comm'n v. Renner*, 143 P.2d 181 (Wyo. 1943). As to the contention that the system provided for payments to those who were not poor, but to all unemployed, the Court stated the Legislature had the right to take into consideration the difficulties which may be encountered in administration of the Act. The Court refused to condemn the Act because in isolated incidents payment might be to those undeserving or not poor, rather it held the "rule of probability" should apply and that in the ordinary case the unemployed workman needs the payment under the Act.

⁸ *Bd. of Cty. Comm'rs v. White*, 335 P.2d 433 (Wyo. 1959).

"The constitutional prohibition against a municipality lending its credit to a private corporation has no application when there is an exchange of consideration between the parties."⁹

The Court's holding that when there is an exchange of consideration, the lending of credit provision has no application, appears applicable to the donations clause. Although "donation" is not defined by the Constitution, the general dictionary definition of donation or "gift" is something voluntarily transferred without compensation.¹⁰ Contractual requirements could be argued to negate claims that donations are being made when consideration is present—either a detriment incurred by the person making the promise or a benefit received by the other person.

But it does not appear that "any" consideration is adequate. A case challenging the ability of a school district to enter into a mutual insurance contractual relationship is instructive on this point. In this case, the Court upheld a school district's action of insuring its buildings through a mutual insurer. The complaining party urged that because the district was assuming a contingent liability to contribute to the losses of other members of the insurance contract, the district was lending its credit in violation of Article 16, Section 6. The Court held that Article 16, Section 6 would be violated if the contingent liability were *unlimited*, but since it amounted to a defined dollar amount equal to the premium, no violation was found.¹¹ If any type of consideration were adequate, the Court would not have had reason to state that unlimited exposure of the school district would have violated Article 16, Section 6.

In general, "[c]onsideration may take a variety of forms including the performance of some act, a forbearance, or the creation, modification, or destruction of a legal relationship."¹² Conversely, consideration is insufficient when, for example: (1) the promisee is performing a duty imposed by law;¹³ (2) there is payment of an already-existing debt that is due and undisputed;¹⁴ or (3) one party has already undertaken performance before a promise is made.¹⁵ "Ultimately, in testing to determine if consideration is sufficient, the [Wyoming Supreme Court] is asking: 'What did you give to get what you got?'"¹⁶

C. Conclusion

Whether a court would hold any potential film incentive legislation unconstitutional would be a fact specific inquiry and dependent upon the legislation itself. However, to help address the constitutional issues discussed in this memorandum, any such legislation should clearly serve a public purpose and make certain that the state receives adequate consideration in return for any monetary incentives being offered under the program. Without these components, any such program would likely be subject to challenge under the Wyoming Constitution.

⁹ *Frank v. Cody*, 572 P.2d 1106 (Wyo. 1977)

¹⁰ *Black's Law Dictionary* 696 (7th ed. 1999).

¹¹ *Burton v. Sch. Dist.*, 47 Wyo. 462, 38 P.2d 610 (1934).

¹² *Schlesinger v. Woodcock*, 35 P.3d 1232, 1237 (Wyo. 2001).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Lavoie v. Safecare Health Serv., Inc.*, 840 P.2d 239, 249 (Wyo. 1992).

¹⁶ *Prudential Preferred Props. v. J & J Ventures*, 859 P.2d 1267, 1272 (Wyo. 1993).