



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE August 19, 2022

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

FROM Luke Plumb, Staff Attorney

SUBJECT Constitutionality of Potential Film Incentive Legislation

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 is discussed below, there are constitutional provisions that may be raised concerning whether such a program would be lawful. However, such inquiries may 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 any potential film incentive legislation. This memorandum also briefly addresses film incentive legislation from New Mexico, Montana, and Colorado.

Discussion

The section summarizes applicable law on pertinent constitutional provisions and other authority. The general principles distilled from that summary are then applied to the potential development of a film incentive program:

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 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 a 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

The Wyoming Constitution governs the appropriation of state funds. First, Article 16, Section 6(a)(i) of the Wyoming Constitution, 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, prohibits appropriating state funds for general benevolent and other purposes:

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.").

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.

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 be 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

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

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

⁶ *Carter*, 215 P. 477 at 483.

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:

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

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).

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

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

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

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 could be drafted to serve a public purpose ensure 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.

Film Incentive Legislation from Other States

Several states offer incentives for film production including New Mexico, Montana, and Colorado as briefly discussed below. New Mexico and Montana operate their program through tax credits to production companies while Colorado, similar to Wyoming, offers a rebate program for qualified production expenses. Research has revealed no constitutional challenge to the film incentive programs in these states. It is important to note though that other states operate under constitutional provisions and case law concerning donations of state funds and uniformity of taxation that differs from that which governs Wyoming.

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).

1. New Mexico

New Mexico provides an incentive for film production through the “film and television tax credit”.¹⁷ This program is outlined in statute and provides a base tax credit amount at 25%.¹⁸ A qualified production can also receive additional “uplifts” to the tax credit amount in increments of 5% with a total available tax credit amount of 35%.¹⁹ The tax credit is operated by the New Mexico taxation and revenue department which may allow tax credits for direct production expenditures and postproduction expenditures that were actually made in New Mexico.²⁰ Research showed that New Mexico’s constitution prohibits donations to or in aid of any person, association or public or private corporation and that this provision has been amended several times to provide exemptions.²¹

2. Montana

Montana passed the Montana Economic Development Industry Advancement (MEDIA) act in 2019, effective January 2024 through 2029, which similarly provides a tax credit incentive to production companies.²² The program offers a 20% transferrable income tax credit on production expenditures made in the state.²³ There are additional tax credit amounts that may be claimed for various circumstances but the maximum amount of tax credit available to be claimed by a production company is 35%.²⁴ Montana’s system of administration for the MEDIA act is different from the proposed Wyoming program because a production company must first apply for certification through the department of commerce and the film office to receive the credit.²⁵ Once the production company has been certified, it can claim the tax credit through the Montana department of revenue.²⁶ While research revealed no constitutional challenge to this law, it should be noted that the Montana Constitution does require that “[t]axes shall be levied by general laws for public purposes”.²⁷

¹⁷ NMSA 7-2F-6(a).

¹⁸ *Id.* at (b), see *Incentives*, New Mexico Film Office, available [here](#) (last visited August 10, 2022).

¹⁹ N.M.S.A. 7-2F-7.

²⁰ N.M.S.A. 7-2F-6(b).

²¹ N.M. Const. Art. IX, Sec. 14. A 1987 New Mexico Attorney General Opinion explained that while the state of New Mexico may spend its funds to promote New Mexico within the film industry, it cannot donate its funds to a private corporation that may be performing the same function. 1987 N.M. Op. Att’y Gen. No. 1987-33. See *Public Purpose and Economic Development: The Montana Perspective*, 51 *Mont. L. Rev.* 356 (1990).

²² M.C.A. 15-31-1007.

²³ *Id.* at (3), see MEDIA Tax Credit, Montana Film Office, available [here](#) (last visited August 10, 2022).

²⁴ *Id.*

²⁵ *Id.* at (2).

²⁶ *Id.* at (7).

²⁷ Mont. Const., Art. VIII, Sec. 1. Article XIII, Section 1 of the 1889 Constitution of Montana prohibited loaning or giving of credit and donations, but this provision was omitted from the 1972 Constitution.

3. Colorado

Colorado maintains a performance-based rebate program for film production that can equal up to 20% of the production company's qualified expenditures in the state.²⁸ In addition, Colorado operates the "State Guarantee Loan Program" in which the state may finance up to 20% of an entire production's budget if qualified.²⁹ The programs are operated through the office of economic development.³⁰ The programs are split between productions that originate activities in the state with a lower monetary threshold of \$100,000 to qualify. Productions that originate outside of the state can receive the rebate for projects exceeding \$1,000,000 or \$250,000 if the production's workforce is comprised of at least 50% Colorado residents.³¹ Similarly, to qualify for the state guarantee loan program, a production must spend at least \$250,000 on local production expenditures and follow the guidelines of the rebate program.³²

No legal challenge to Colorado's film incentive loan guarantee or performance-based rebate programs were found, although the Colorado Constitution does require that the state "not pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever" and prohibits any "donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company or a joint owner with any person, company, or corporation, public or private, in or out of the state. . . ."³³

²⁸ C.R.S. 24-48.5-116(1)(a) and (b).

²⁹ C.R.S. 24-48.5-115. See *Incentives & Permits*, Film in Colorado, available [here](#) (last visited August 22, 2022).

³⁰ C.R.S. 24-48.5-116(1)(a) and (b) and 24-48.5-115.

³¹ C.R.S. 24-48.5-116(1)(a) and (b)

³² C.R.S. 24-48.5-115.

³³ Colo. Const., Art. XI, Sec. 1 and 2.