



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE January 4, 2016

TO Members, Management Council

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SUBJECT Constitutionally Permissible Content of the General Appropriations Bill.

This memorandum addresses the content of the general appropriations bills and the requirements of the Wyoming Constitution to only include appropriations for the “ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt, and for public schools” in the “general appropriations bills.” It also addresses constitutional issues of the single subject rule and separation of governmental powers in the context of including appropriations and permissible conditions on appropriations in the general appropriations bills.

The issue of what is constitutionally appropriate content for the budget bill is not a new issue. In 2013, Governor Mead noted in his letter to the presiding officers of the House and Senate, concerns then Attorney General Greg Phillips had with the breadth of a budget footnote and whether it comported with constitutional requirements.¹ Going further back, then State Representatives Steve Freudenthal and Cynthia Lummis wrote a letter dated April 18, 1988 to members of Management Council and the Chairs of Joint Appropriations Committee advocating actions which they suggested would help ensure adherence to constitutional requirements within the appropriations bills.²

Since the inception of LSO to current day, depending on the circumstances, time permitting being the most crucial, LSO has provided the Joint Appropriations Committee and individual legislators with memos or verbal comments concerning amendments to or provisions in the

¹ While Governor Mead noted his concern with this budget footnote, he also stated that he did not believe a veto was in order. Letter from Governor Matthew Mead to President Tony Ross and Speaker Tom Lubnau (Feb. 21, 2013), <http://legisweb.state.wy.us/2013/Enroll/HB0001V1.pdf>.

² Letter from Representative Steve Freudenthal and Representative Cynthia Lummis (April 18, 1988) (on file with LSO).

appropriations bills that call for interpretation of constitutional provisions related to the general appropriations bill. This memo is intended to be a comprehensive examination of this issue. Unfortunately, there is scant Wyoming case law, and very few formal attorney general opinions, to guide this inquiry. Given that, much of the analysis of this issue is gleaned from the court decisions of other states.

At the outset, it is important to note some general background items. First, research has not uncovered a successful court challenge to an appropriation contained in a general appropriations bill in Wyoming history. There has not been a Wyoming Supreme Court case reporting a constitutional challenge to an appropriation in a general appropriations bill since 1978.³ Also, all enacted legislation, including general appropriations bills, contain the strong presumption of constitutionality that must be overcome by the party challenging the legislation.⁴ Also important to note is that the power to appropriate funds is solely vested in the legislature and courts have held that they will not disrupt the power of a co-equal branch of government absent a clear constitutional violation.⁵ The Wyoming Constitution, as with all state constitutions, is a restriction on legislative authority, not a grant of that authority.⁶ That is important to bear in mind in this context because the fact that an appropriation *could* have been included in separate legislation, does not mean that a court can *require* that appropriation be separated from a general appropriations bill unless clearly contrary to a provision of the Constitution.

Finally, for quite some time Wyoming general appropriations bills have contained a much broader spectrum, both in kind and degree, of appropriations and directions on the use of those appropriations than some neighboring states, particularly Colorado. The general appropriations bills in early sessions contained primarily appropriations for clearly ordinary expenses of the three branches. But some of the appropriations were not so clearly for those purposes. The 1893 general appropriations bill contained an appropriation to pay the Colorado school for the blind for the board and tuition of George Jones and Emma Gerdal.⁷ There was also an appropriation for an attorney's bill in a land case involving the State.⁸ In 1897 the general appropriations bill contained funding for the stenographer in the impeachment case of Judge Metz.⁹ That expense might well be ordinary in some form of the word, but certainly could not be considered

³ See *Witzenburger v. State ex rel. Wyo. Community Dev. Auth.*, 575 P.2d 1100 (Wyo. 1978).

⁴ *Smith v. State*, 2013 WY 122, ¶21 (Wyo. 2013) (citation omitted).

⁵ See *Barbour v. Delta Corr. Facility Auth.*, 871 So. 2d 703, 708 (Miss. 2004), ("Indeed, [power of the purse strings] is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the Legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system.")

⁶ *Cathcart v. Meyer*, 2004 WY 49, ¶45 (Wyo. 2004) (citing *Witzenburger v. State*, 575 P.2d at 1132).

⁷ 1893 Wyo. Sess. Laws, Chapter 22, section 13. It appears that a number of other appropriations for likely non-recurring expenses were included in the enacted bill, but vetoed by the Governor; comparing the title and provisions noted as disapproved by the Governor shows, for example, a deleted appropriation for the relief of the Converse County Fair Association.

⁸ *Id.* at Section 39.

⁹ 1897 Wyo. Sess. Laws, Chapter 51, section 27.

recurring, as there is no other recorded impeachment case in the State's history. By 1909 the general appropriations bill included such items as payment for the relief of Claude McDermott for sickness incurred while a member of the National Guard, for horticultural experiments at the Experimental Farm in Lander, for holding local short courses on farm issues to be managed by the Agricultural Department of the University, for payment of bounty claims under a 1905 law (with Elmer Babcock being the low claimant for one coyote and C.F. Colburn receiving \$97 for his ninety-seven coyotes). The coyote pelts were probably nice, as 1908 likely was a cold winter; the 1909 bill also appropriated funds for new boilers and a heating system at the Rawlins penitentiary and a boiler for the Capitol building. The federal government also received funding with an appropriation to be paid to the Manager of the Experiment Stations of the United States Department of Agriculture for experiments in dry farming and soil culture.¹⁰ In 1917, the general appropriations bill contained funding for farms and sheds for the Holstein herd at Archer, Wyoming, completing and finishing the old part of the Capitol, reimbursement of legislators attending Buffalo Bill Cody's funeral, and for reimbursing rancher W.J. Monnet for items taken by a road gang escapee, including a 30-30 rifle and ammunition and a seven-eighths carat diamond ring.¹¹

While history cannot trump the Constitution, in this particular context it might help to define "ordinary" for purposes of Article 3, Section 34. That aspect is discussed in detail below. It might also be seen as indicative of either the lack of appetite to litigate on this issue, or a realization that given the unique pressures of Wyoming's short legislative sessions, the Wyoming Constitution's provisions on general appropriations bills' content were not intended to be as strictly applied as similar provisions have been applied in some other jurisdictions.¹²

The two overarching issues under review can be boiled down to: (1) What *appropriations* are constitutionally allowed in general appropriations bills; and (2) What *conditions or restrictions* are constitutionally allowed on those appropriations in a general appropriations bill.

Ordinary Expenses of Government

Article 3, Section 34 of the Wyoming Constitution provides:

The general appropriation bills shall embrace nothing but appropriations for the ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations

¹⁰ 1909 Wyo. Sess. Laws, Chapter 151, sections 10, 12, 17, 26, 42, 46, 59.

¹¹ 1917 Wyo. Sess. Laws, Chapter 125, sections 43,45, 51A, 52, 53.

¹² By way of example only, the following amendment was proposed, adopted and enacted into the 1971 general appropriations bill (1971 Wyo. Sess. Laws, Chapter 259, section 22.):

The Higher Education Council shall serve at the direction of the "Management Council" of the Legislative Service Agency. The powers, duties and additional duties as set forth in Sections 1,2,3,4,5 and 6 of Chapter 144, Session Laws of Wyoming 1969, are hereby abridged to the extent that any such mentioned power, duty, action or function shall first have the prior approval of the "Management Council".

shall be made by separate bills, each embracing but one subject.

While the main focus of this section will be on what is considered an “ordinary expense” of the three branches of government, another aspect of Article 3, Section 34 should be mentioned to provide some historical context to explain why appropriations in a general appropriations bill are limited to only those ordinary expenses, interest on the public debt and appropriations for public schools. The budget bill is unique in that it is one of only two classes of legislation which may contain more than one subject.¹³ The budget bills in numerous states with constitutions adopted in the last half of the nineteenth century and later are authorized to contain multiple subjects. While fearing the proliferation of omnibus bills, the drafters of these constitutions also realized that it was an impossible task to pass separate legislation for every appropriation.¹⁴ Restricting the appropriations in budget bills to such things as ordinary expenses of the three branches of government, payment of interest on debt, and support of public schools was a compromise position to allow for the efficient operation of government while still attempting to restrict riders on bills and other logrolling tactics.¹⁵ The Supreme Court of Pennsylvania described this compromise:

Bills, popularly called 'omnibus bills,' became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood, as 'logrolling.' A still more objectionable practice grew up, of putting what is known as a 'rider' (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious

¹³ Article 3, Section 24 of the Wyoming Constitution provides:

No bill, except *general appropriation bills and bills for the codification and general revision of the laws*, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. (emphasis added).

¹⁴ See Childree v. Hubbert, 524 So. 2d 336, 343 (Ala. 1988) (Torbert, C.J. concurring in part and dissenting in part), (“It probably became evident that there was an advantage in allowing more than one subject to be included in a single bill where that bill provided for the ordinary expenses of state government. It is impractical and too time-consuming to fund every agency in a separate bill. In summary, § 45 placed a restriction on the Legislature by requiring it to pass a separate bill for each subject, and § 71 was an exception to that general requirement necessary to provide for the orderly funding for state government.”).

¹⁵ The Supreme Court of New Mexico described the purpose of constitutional provisions requiring single subject and also the appropriation bill exception in State ex rel. Lucero v. Marron, 17 N.M. 304, 311 (N.M. 1912) (“The primary object was undoubtedly to protect the state treasury against legislative raids by the insertion of special appropriations for new purposes in a general appropriation bill where they might pass unnoticed, when possible, careful scrutiny and examination of such items upon their merits, if presented separately, would result in their defeat.”)

legislation, or bring the wheels of the government to a stop for want of funds. These were some of the evils which the later changes in the constitution were intended to remedy. Omnibus bills were done away with by the amendment [to the Pennsylvania Constitution] of 1864 that no bill shall contain more than one subject, which shall be clearly expressed in the title. But this amendment excepted appropriation bills, and as to them the evil still remained. The convenience, if not the necessity, of permitting a general appropriation bill containing items so diverse as to be fairly within the description of different subjects was patent. The present constitution meets this difficulty -- First, by including all bills in the prohibition of containing more than one subject, except 'general appropriation bills' (article 3, § 3); secondly, by the provision that 'the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the commonwealth, interest on the public debt, and for public schools; all other appropriations shall be made by separate bills each embracing but one subject'¹⁶

With that knowledge providing a framework for the discussion of constitutionally allowable appropriations in a Wyoming budget bill, we are better able to apply the language of Article 3, Section 34. The key phrases in this Constitutional section can be summed up as thus: (1) What is an “ordinary expense”; and (2) What qualifies as the legislative, executive and judicial department?¹⁷ The answers to these questions are not as straightforward as they first may appear. Courts that have decided these questions have developed various tests to help determine whether an appropriation is for an ordinary expense of government.

First it should be noted that the modifier “ordinary expenses” does not extend to public schools. Principles of statutory construction dictate abiding by the plain meaning of a statute if its language is clear and unambiguous.¹⁸ Here Article 3, Section 34 is unambiguous in describing three classes of appropriations that may be contained in a general appropriation bill items in a series: appropriations for the ordinary expenses of the legislative, executive and judicial departments of the state; appropriations for the interest on the public debt; and appropriations for the public schools. Thus, it appears evident that expanded classes of appropriations for public schools, such as potentially school capitol construction and special or extraordinary appropriations may be permissible in a general appropriations bill even if the same type of appropriation is restricted for one of the three branches of government.¹⁹

¹⁶ Hosp. & Healthsystem Ass'n of Pa. v. Dep't of Pub. Welfare, 585 Pa. 106, 118 (Pa. 2005) (quoting Commonwealth v. Barnett, 199 Pa. 161, 48 A. 976, 977 (Pa. 1901)).

¹⁷ While the general appropriations bill can *only* contain the appropriations listed in Article 3, Section 34, the constitution allows those classes of appropriations to be funded through other legislation. See Cornwall v. State, 231 Mont. 58, 66 (Mont. 1988) (“The legislature could have set out the [purchase of a modular building] in a separate statute or law instead of including it in the general law, but that problem is “broadly speaking for the legislative assembly alone”) and State ex rel. Oster v. Jorgenson, 81 S.D. 447, 453 (SD 1965) (“Matters which could be included in the general appropriation bill may be the subjects of special appropriation bills without nullifying consequences.”)

¹⁸ See Peterson v. Wyoming Game And Fish Comm'n, 989 P.2d 113, 117 (Wyo. 1999) (citations omitted).

¹⁹ Other constitutional directives for the Legislature to provide funding for schools should be considered when

Wyoming case law on the issue of “ordinary expenses” under Article 3, Section 34 involves two reported cases in 125 years of statehood. In 1924, an appropriation in the budget bill to provide a dollar a day salary for enlisted men in the Wyoming National Guard when in camp or on maneuvers was challenged “as not for the ‘ordinary expenses’ of the legislative, executive or judicial departments, and not, therefore, of the class of claims that could lawfully be paid from an appropriation embraced in the general appropriation bill.”²⁰ The Wyoming Supreme Court held that because the Legislature had the **continuing duty under Article 17, Section 2 of the Constitution to provide for a militia**, and also substantive laws created an obligation to fund the National Guard, this appropriation was certainly an “ordinary expense” of the executive branch.²¹ The Court also stated that the wisdom of providing for expenses to pay enlisted men rather than other expenses of the National Guard was a legislative rather than judicial decision.²²

Next in the seminal case of Witzenburger v. State, the court touched on whether the appropriation for the Wyoming Community Development Authority (WCDA), appearing in a general appropriations bill, was constitutional when assailed as a violation of Article 3, Section 34.²³ The WCDA was established in separate legislation. Funding for the administrative expenses of the WCDA was provided in the general appropriations bill. One of the claims presented was that because the WCDA was a separate body corporate, it was not part of any of the departments specified in Article 3, Section 34. The Court held that once the WCDA was created by law, it could be provided an appropriation for “purely administrative purposes.”²⁴

Witzenburger and Carter seem to stand for the proposition, once another law (constitution, statute, continuing session law) creates a program (or at least one within one of the three branches of government), funding of that program can be carried forward in the general appropriations bill as an ordinary expense of government.²⁵ This view comports with the holdings of a number, but certainly not all, other state courts.²⁶

interpreting the full implication of Article 3, Section 34 on appropriations for public schools in the budget bill. See generally Campbell County Sch. Dist. v. State, 2008 WY 2 (Wyo. 2008). Given the use of the term “public schools” in other areas of the constitution, this term in Article 3, Section 34 likely only encompasses the kindergarten through high school public school system in Wyoming and does not extend to the University of Wyoming and community colleges.

²⁰ State ex rel. Davis v. Carter, 31 Wyo. 401, 410-11 (Wyo. 1924).

²¹ Id.

²² Id. at 412.

²³ Witzenburger, 575 P.2d 1100.

²⁴ Witzenburger, 575 P.2d at 1132. The Court first concluded that the WCDA was not a political subdivision, despite that designation by the legislation. It had characteristics of a state agency and was labeled a state instrumentality by the Court in most of the opinion. Interestingly, the appropriations bill at issue in Witzenburger contained explicit statutory changes to various state employee compensation provisions. Those provisions were not at issue in the case.

²⁵ See Carter, 31 Wyo. at 411.

²⁶ See State ex rel. Lucero v. Marron, 17 N.M. 304, 323 (N.M. 1912) and Opinion of the Justices, 582 So. 2d 1115, 1120 (Ala. 1991) ; but compare to Farrell v. Oliver, 146 Ark. 599 (Ark. 1921) (holding the control of charitable institutions created by the legislature falls within executive powers of government, but the control and maintenance of such institutions is not an ordinary expense of the executive department as defined by the Arkansas Constitution).

The Montana Supreme Court in Miller Insurance Agency v. Porter, adopted the following test to determine what is an ordinary expense of the three branches of government: "Any expense which recurs from time to time and is to be reasonably anticipated as likely to occur in order for the proper operation and maintenance of the departments of the state government is an ordinary expense."²⁷ With this test, the court found that the payment of insurance premiums constituted an ordinary expense and concluded that fire insurance was part of the care and maintenance of state buildings.²⁸

Applying this test fifty years after its adoption, the Montana Supreme Court approved of the purchase of modular buildings to act as a law enforcement training center.²⁹ The Montana court held that the expense of purchase of the buildings was "certain to occur during the biennium and none can doubt the power of the legislature to make provision for biennial expenses through appropriations, whether those expenses are incurred through purchase or by lease."³⁰

South Dakota has a constitutional budgetary scheme which is different than Wyoming's. While South Dakota's Constitution on the general appropriations bill contains much of the same language as Wyoming's, it further requires all other appropriations be adopted by a two-thirds vote of the South Dakota Legislature.³¹ Given the supermajority required to enact other appropriations, it is probably not surprising that a substantial body of case law has developed in South Dakota concerning what is an ordinary expense and what is an extraordinary expense not appropriate for the general appropriations bill. In determining what is an ordinary expense in the constitutional sense, the South Dakota Supreme Court has cited with approval the definition of "ordinary" from Black's Law Dictionary:

Black's Law Dictionary, 4th ed., defines the word "ordinary" in its adjectival sense as "Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances . . .".³²

Using this definition, the South Dakota court determined that the term "ordinary expenses of the executive, legislative and judicial departments of the state [is construed] to mean any related expense which recurs with regularity and certainty. . . . Extraordinary, emergent, and exceptional expenses for any purpose likewise fall within the category of all other appropriations."³³ The

²⁷ Miller Insurance Agency v. Porter, 93 Mont. 567, 571, 20 P.2d 643, 645 (Mont. 1933).

²⁸ Id. at 573.

²⁹ Cornwall v. State, 231 Mont. 58 (Mont. 1988).

³⁰ Id. at 66.

³¹ South Dakota Constitution, Article 12, Section 2 provides: "The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, *and shall require a two-thirds vote of all the members of each branch of the Legislature.*" (emphasis added).

³² Apa v. Butler, 2001 SD 147 ¶23 (S.D. 2001) (quoting State ex rel Oster v. Jorgenson, 81 S.D. 447, 454-55).

³³ Duxbury v. Harding, 490 N.W.2d 740, 744 (S.D. 1992) (quoting Oster, 81 S.D. 456).

South Dakota court has found that "extraordinary expenses" not allowed in the general appropriations bills include appropriations for, "an approaching pestilence, or to make temporary provision for the patients of the insane hospital, unhoused and scattered by a devastating fire, or for any other exceptional and extraordinary object essential to the welfare of the state."³⁴ Using this analysis, the South Dakota Court in 1965 considered sixty-eight separate appropriations and struck ten as beyond the scope of the general appropriations bill. Of those ten, eight were appropriations for new construction, one was an appropriation for land acquisition, and one appropriated funds for road maintenance in violation of a separate constitutional provision on road construction.³⁵

Further explaining the use of terminology in prior decisions, the South Dakota court in 2001 stated:

[The South Dakota Court has used] the following terminology in defining the concept of "ordinary and current expenses of state government" --regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; continuing expenditures for maintenance or carrying on an office; current expenses of government; expenses recurring from time to time; expenses reasonably anticipated as likely to occur; expenses incident to officing and maintaining state government; expenses incident to preserving in repair and maintaining state property; expenses recurring with regularity and certainty; running expenses; usual, regular and continuing expenses for maintenance of property and for conducting regular and authorized functions. In contrast, the following terms are used in describing extraordinary expenses: exceptional and extraordinary objects essential to the welfare of the state; extraordinary, emergent and exceptional expenses for any purpose.³⁶

Appropriations found to be beyond the scope of the South Dakota general appropriations bills include: an appropriation for property tax credits; an appropriation for construction of a National Guard Armory; and an appropriation to reimburse counties for presidential primary expenses.³⁷ Appropriation for "operating expenses" of the South Dakota State Fair were held to be ordinary expense because statutes creating the state fair had existed for a number of years, but new facilities construction would have been an extraordinary expense.³⁸ Additionally, appropriations for grants to non-state programs to administer a program to assist victims of domestic and sexual abuse was found to be an ordinary expense of state government because it was enacted a dozen years prior to the challenged appropriation.³⁹ The same rational was used to uphold an

³⁴ Apa, 2001 SD 147 ¶23.

³⁵ Id. at ¶25.

³⁶ Id., 2001 SD 147 ¶27 (quoting Oster, 81 S.D. at 456 and Duxbury, 490 N.W.2d at 744).

³⁷ Id. at ¶26.

³⁸ Id. at ¶28.

³⁹ Id. at ¶29.

appropriation for grants to local governments to purchase and refurbish firefighting equipment.⁴⁰ The South Dakota Court noted that “[e]ven if it may have been an extraordinary expense at inception ... the unusual and extraordinary may become usual and ordinary. The expanding cost of various health and welfare programs is an example.”⁴¹

The Pennsylvania Supreme Court in 1894 applied a very similar provision to Article 3, Section 34 and upheld the creation and funding for the salary for a clerk in the offices of the prothonotaries of the Supreme Court in the 1893 general appropriations bill.⁴² The Pennsylvania court upheld the provision, holding that the appropriation in question was simply incidental to the main purpose of the appropriations act, which is to secure the performance of the regular and ordinary work of the three branches of government. The Court stated, “[i]n passing general appropriation bills the constitution limits them to the ‘ordinary expenses of the executive, legislative and judicial departments,... and every valid appropriation in this form must appear to be reasonably within the description of ‘ordinary expenses,’ but it would be sticking in the bark to require a separate bill to be passed every time an additional clerk was to be appointed in a public department. In regard to the particular item under consideration, it appears to be intended to pay for part of the regular and ordinary work of the offices named, and therefore to be for their ordinary expenses.”⁴³

Unlike Pennsylvania, the Colorado Supreme Court has determined that its budget bill cannot fix the compensation for government officials. “A law must be enacted providing for its allowance before the compensation or expenses of state officials can be included in the general appropriation bill.”⁴⁴

From the above, it seems clear that if duly enacted legislation creates a program within the three branches of government, funding for that program is an “ordinary expense” for purposes of Article 3 §34. Such funding could likely include appropriations for funding models enacted in separate legislation, and it would seem more clearly so if the funding models are distributed through one of the three branches of government. Expenses which could be considered “special” or “extraordinary” as compared to “ordinary” could include one-time appropriations which are not otherwise authorized by law, appropriation for a program wholly created in the general appropriations bill,⁴⁵ appropriations for special flood or fire relief, and other such appropriations which are based on extraordinary, emergent and exceptional situations, even if these appropriations clearly have a public purpose.

⁴⁰ *Id.* at ¶30.

⁴¹ *Id.* at ¶29 (citing *Oster*, 81 S.D. at 450 (“[I]t is of no great significance that a particular appropriation has never been included in a general appropriation bill in the past as precedent alone does not prove or disprove the existence of legislative power to do so.”))

⁴² *Commonwealth ex rel. Greene v. Gregg*, 161 Pa. 582 (Pa. 1894).

⁴³ *Id.* at 587-88.

⁴⁴ *Leckenby v. Post Printing Publishing Co.*, 65 Colo. 443, 448 (Colo.1918).

⁴⁵ This issue will be more fully developed and discussed in the “Substantive law in the Budget Bill” section of this memo.

The Wyoming Supreme Court is in accord with other states that treat funding of a program separately established as an ordinary expense. Further, while no Wyoming case has been found, it is almost certain that a general appropriations bill can include other appropriations for items which have not been previously enacted into law to the extent those appropriations are for the ordinary expenses of the three branches of government. Application of tests developed in other states is helpful to determine what may be an ordinary expense in Wyoming. Following the example of the supreme courts of Montana and South Dakota, to qualify as an ordinary expense, such an appropriation would have to be fairly characterized as: regular; usual; to be reasonably anticipated as likely to occur in order for the proper operation and maintenance of the departments of the state government; current expenses of government; expenses recurring from time to time; expenses reasonably anticipated as likely to occur; expenses recurring with regularity and certainty, rather than characterized by peculiar or unusual circumstances or extraordinary, emergent and exceptional expenses for any purpose.

A question arises whether capital construction is properly considered as an “ordinary expense” or an extraordinary or special expense. While it is to be assumed that the State of Wyoming will need to construct buildings to house the operation of government, the constitutional question is whether those appropriations should be in a separate act. No Wyoming case on this point has been discovered. Turning to other states, South Dakota and Colorado switch “strict and liberal interpretations” from that discussed above. South Dakota appears to find that capital construction is not generally an ordinary expense of state government, while the Colorado General Assembly includes capital construction for state agencies, universities and community colleges in its general appropriations bill. While the Montana Court found that a modular unit constructed during the fiscal biennium for law enforcement training was properly included in the general appropriations bill, Montana does not appear generally to include capital construction funding in its budget bill.

The final part of this question is what agencies, institutions or entities constitute one of the three branches of government. Relying on Witzenburger and Carter, it is clear that the National Guard and the WCDA are considered within state government for purposes of that constitutional provision as the appropriations had nothing to do with interest on the public debt or support of the public schools. The WCDA is noteworthy as the entity being funded was a “separate body corporate” labeled by the Court to be a state instrumentality, to perform governmental functions having a public purpose, whose administrative costs were deemed by the court to be “executive in nature.”⁴⁶

The Colorado Supreme Court has on at least one occasion been asked to decide what officers of the state belong to the executive department for purposes of a similar constitutional provision.⁴⁷ Noting that the state's constitutional definition of executive department was limited to seven elected officers, the Colorado Court nonetheless found:

⁴⁶ Witzenburger, supra n. 14. Id. at 1110.

⁴⁷ Parks v. Commissioners of Soldiers' & Sailors' Home, 43 P. 542, 545 (Colo. 1896).

every officer of this state who holds his position by election or appointment, and not by contract, and whose duties are defined by statute, and are in their nature continuous, and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the legislative, executive or judicial department of the government, and may in the discretion of the legislature properly have his salary included in the general appropriation bill . . . Moreover, as the officers established by the constitution and those created by authorized legislative authority are usually required to keep offices, records, papers, etc., it is evident that expenses for these and like items may also be provided for as a part of the ordinary expenses of the legislative, executive and judicial departments of the government.⁴⁸

In South Dakota, the state's Supreme Court rejected the claim that only state institutions, agencies, boards or other like entities authorized by the Constitution were included in the executive department for purposes of a similar constitutional provision.⁴⁹ Comparing penal, charitable and education institutions authorized by the state constitution to those statutorily created, the Court stated: "We cannot believe our constitutional fathers intended to discriminate in this manner between our various state institutions."⁵⁰ In regards to legislatively created boards, agencies and commissions, the Court found:

with few well recognized exceptions, . . . the power of appointing such officials is vested in the Governor and all, in a broad sense, engage in the function of executing our laws. For budgetary and appropriative purposes most administrative boards, agencies, and commissions are appropriately considered to be part and parcel of the executive branch of our government.⁵¹

Of note, in a subsequent South Dakota case, the state's highest court upheld as ordinary expenses of state government appropriations to state departments to be used for local programs.⁵² Specifically, the appropriations were to the department of agriculture "to acquire and refurbish surplus motor vehicles and equipment . . . for distribution to local and rural fire departments for fire suppression purposes" and to the department of health to make grants to local emergency medical services in purchasing and upgrading necessary equipment.⁵³ In both cases, the South Dakota Court held the longevity and recurrence of the program established each as ordinary expenses of state government.⁵⁴

Of the institutions and entities funded through the general appropriations bill questions could be raised as to whether the University of Wyoming, community colleges and local governments

⁴⁸ Id. at 546.

⁴⁹ Oster, 136 N.W.2d at 875–76 (S.D. 1965).

⁵⁰ Id. at 875.

⁵¹ Id. at 877.

⁵² Apa, 638 N.W.2d 57, ¶¶ 30–31 (S.D. 2001).

⁵³ Id.

⁵⁴ Id.

properly fall within one of the three branches of government. Each of these classes of institutions and entities has its own unique characteristics which mitigate for and against inclusion in one of the three branches of state government. Potentially important to note is that the University of Wyoming is created in the Constitution and the Constitution also requires the legislature to “establish and maintain “a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.”⁵⁵ In 1989 then Wyoming Attorney General Joseph Meyer noted the Wyoming Constitution mandates the Legislature raise and appropriate sufficient revenue for the University to function at a level of full efficiency.⁵⁶

The University is established by the Constitution and Article 7 § 16 provides “in order that instruction furnished may be as nearly free as possible, any amount in addition to the income from its grants of lands and other sources above mentioned, necessary to its support and maintenance in a condition of full efficiency shall be raised by taxation or otherwise, under provisions of the legislature.” In the Carter case discussed above, the Court referenced the Constitutional duty to provide for a militia in finding that an appropriation for that purpose fell within the parameters of Article 3 § 34. The University’s management is to be provided by legislative act, yet separately governed by a board of trustees. But that board is appointed by the Governor and its duties are required to be prescribed by law. The WCDA was a separate body corporate, with a board appointed by the Governor and the Wyoming Supreme Court found that funding of its administration was within the parameters of Article 3 § 34. On the other side of the argument, the University is established under the Constitution in Article 7, (not under article 3, 4 or 5 governing the legislature, executive and judiciary) as a state institution.

⁵⁵ Wyoming Constitution Article 7, Section 15 and Article 7, Section 1. Unlike the University, Community Colleges in Wyoming are statutorily created. On community colleges, the Wyoming Supreme Court stated:

We take judicial notice of the fact that community colleges and junior colleges were not authorized or created in Wyoming until 1951. When our state constitution was adopted in 1890, it was provided in Art. 7, § 1, Wyoming Constitution, that the legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, "and such other institutions as may be necessary."

In giving consideration to the various categories of schools referred to in Art. 7, § 1, it is entirely clear that community colleges can only come under the category of such other institutions as may be necessary. It is also clear that when the legislature authorized the establishment of community colleges and provided for community college districts, it intended such districts to be something separate and apart from a "school district," as this term is used in Art. 16, § 5.

Goshen County Community College Dist. v. School Dist., 399 P.2d 64, 65 (Wyo. 1965)

⁵⁶Op. Atty Gen. Wyo. 90 (Opinion No. 89-016).

Turning to other states, Montana has constitutional language almost identical to Wyoming's and funds its university system and community colleges through its general appropriations bill.⁵⁷ Montana does not appear to provide direct support for local governments in its general appropriations bill. Colorado's constitution was amended to include "state institutions" as authorized recipients of funding in the general appropriations bill.⁵⁸ South Dakota's constitutional language also includes the term "state institutions." South Dakota includes funding for its university system and community colleges in its general appropriations bill.⁵⁹

This is an instance where the unique nature of the Wyoming legislative session and the history of Wyoming's general appropriation bills' content may serve as a better indication of what is allowed in those bills than reference to anything else. At least as early as 1895, the general appropriations bill provided funding for state charitable and penal institutions, despite the absence of the term "state institutions" in the Article 3 §34.⁶⁰ For quite some time, the University of Wyoming has been funded through the general appropriations bill.⁶¹ Community colleges began to receive state funding through the general appropriations bill in the 1970s.⁶² Local governments received distributions in the budget bill for the first time in 2004, following "de-earmarking" and a marked reduction in the share of federal mineral royalties and severance taxes received by local governments.⁶³ Again, while history does not trump a clear constitutional provision, longstanding, unchallenged, historic practice, especially practice dating to near the adoption of the Constitution, cannot be ignored in attempting to interpret or construe a provision of the Constitution.⁶⁴

⁵⁷ See Montana 2015 House Bill 2, Section 11, pp. E-4 through E-9.

<http://leg.mt.gov/bills/2015/billpdf/HB0002.pdf>.

⁵⁸ In 1950, the Colorado Constitution was amended to 1950 to delete the word "ordinary" and to include "public intuitions." The provision now reads:

The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

1951 Colo. Laws 42. Colo. Const. Art. V, Section 32.

⁵⁹ See South Dakota 2015 Senate Bill 55,

http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=55&Session=2015

⁶⁰ See, 1895 Wyo. Sess. Laws, Chapter 75, section 12; 1899 Wyo. Sess. Laws, Chapter 63, section 12.

⁶¹ See 1927 Wyoming Session Law Chapter 132, Section 73, general appropriations bill appropriating funds to the University of Wyoming for "Instruction and Research - \$125,000 and Extension Department - \$130,000; 1937 Wyoming Session Law Chapter 148, Section 51, general appropriations bill appropriating funds and specifying total amount of funds the University of Wyoming could spend.

⁶² See 1978 General Appropriations Bill (1978 Wyoming Session Law Chapter 9, Section 2, Section 18 appropriating \$27,886,018 of state funds to the support of community colleges; 1984 General Appropriations Bill-3 (1984 Wyoming Session Law, Chapter 59, Section 2, Section 57) appropriating \$60,713,322 of state funds for the support of specific community colleges. That budget bill also included a Section 200 which stated "No community college may be established in the state of Wyoming unless specifically approved by the Wyoming legislature."

⁶³ See 2004 Wyoming Session Law Chapter 95, Section 305. However, local governments had been receiving funding in the budget bill for the Local Government Capital Construction Account funded under W.S. 9-4-601(a)(vi) and (b)(i) prior to that (see, e.g., 2001 Wyoming Session Laws, Chapter 139, Section 2, Section 60).

⁶⁴ See *Apa* 2001 SD 147, ¶29, ("Even if it may have been an extraordinary expense at inception ...the unusual and extraordinary may become usual and ordinary.").

Substantive Law in the Budget Bill

Article 3, Section 34 restricts the contents of the general appropriations bill to “nothing but appropriations for the ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt, and for public schools.” Article 3, Section 24, requires every bill except general appropriations bills and recodification bills to contain only one subject. Article 2 §1 provides that one branch of government cannot exercise authority properly belonging to another branch. From these constitutional restrictions the question arises, is there anything but appropriations which are allowed in the general appropriations bill?

A distinction which should be clarified is that an appropriation is not a law in its ordinary sense, and that may be the fundamental reason the general appropriations bill is not subject to the constitutional single subject rule. A law establishes or revokes a right or a duty or requires or disapproves of some action. An appropriation does none of these things; it is simply a grant of authority to expend funds for a specified purpose. The Supreme Court of South Dakota described that State’s general appropriations bill:

[A]n appropriation bill is not a law, in its ordinary sense. It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely *lex scripta*.⁶⁵ It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government.

A general appropriation bill is not legislation in the true sense of the term. It is as its language implies "a setting apart of the funds necessary for the use and maintenance of the various departments of the state government already in existence and functioning. . . . In providing that it should embrace nothing else, the framers of the Constitution undoubtedly intended that members of the legislature should be free to vote on it knowing that appropriations and nothing else were involved."⁶⁶

The Wyoming Attorney General has at least twice weighed in on the issue of appropriate content in a general appropriations bill.⁶⁷ In an Informal Opinion dated February 2, 1988, Attorney General Joe Meyer informed the Joint Appropriations Committee that each instance of an appropriations bill affecting substantive law must be separately reviewed on a case-by-case basis

⁶⁵ Black’s Law Dictionary (7th Edition 1999) defines “*lex scripta*” as “written law.... Law authorized or created by statute rather than custom or usage.”

⁶⁶ *Apa v. Butler*, 2001 SD 147, ¶¶14-15 (S.D. 2001) (quoting *State v. Clausen*, 85 Wash. 260, 148 P. 28, 32 (Wash. 1915); *State ex rel. Oster v. Jorgenson*, 81 S.D. 447, 450, 136 N.W.2d 870, 872 (1965); *Sellers v. Frohmiller*, 42 Ariz. 239, 24 P.2d 666 (Ariz. 1933)).

⁶⁷ These memoranda are in addition to any addressed to the Governor, such as the concerns of Attorney General Phillips, noted earlier.

to determine if it violates the Constitution.”⁶⁸ Citing Colorado case law, he noted the first general rule is that substantive legislation, or amends and repeals of law, are not permissible in a general appropriations bill under a constitutional provision similar to Article 3, Section 34. Attorney General Meyer further stated that “[s]ome temporary modifications of substantive law by provisions of an appropriations bill (for the length of the period for which the appropriations are being made) may be permissible.”⁶⁹ But in his view a provision diverting the statutory severance tax directed to the Wyoming Permanent Mineral Trust Fund by W.S. 39-6-302(a), to the general fund or another account was likely not constitutional because an appropriation germane to the appropriations bill did not exist and the diversion involved substantive legislation.⁷⁰ In a later letter of advice, Attorney General Meyer stated that “the legislature can place a valid condition, term, statement or restriction on the expenditure of appropriated funds” in the budget bill.⁷¹

Also in 1988, the LSO was asked whether substantive law could be included in the budget bill and stated:

There is some difference of opinion within Wyoming and in various court opinions as to what items may be included in an appropriations bill. Some courts have held that an appropriations bill can include amendments to or repeal of substantive law, while others have held that an appropriations bill can contain only appropriations. The variations in court decisions are due in large part to unique wording of the applicable constitutional provisions in the states involved.⁷²

A 1984 Wyoming Legislative Service Office report to the Management Council pointed out that in the case of Anderson v. Lamm, 579 P. 2d 620 (Colo. 1978), the Colorado Supreme Court interpreted this section of the Colorado Constitution to mean "that in the general appropriation bill, the general assembly may not include substantive legislation, nor may it amend or repeal a law." Such substantive legislation was held to be void irrespective of any veto.

The LSO stated that constitutional provisions of Wyoming and Colorado were virtually identical and agreed with the Colorado Supreme Court, that “the appropriations bills are to contain just that – ‘appropriations’ and not substantive law. Creations, amendments or repeals of substantive laws are not appropriations.” In conclusion, the memo provided:

⁶⁸ Wyoming Attorney General Informal Opinion to JAC members, p.1 (February 2, 1988).

⁶⁹ Id. at pp. 1-2, citing State ex rel. Prater v. State Board of Finance, 279 P.2d 1042 (New Mex., 1955).

⁷⁰ Id. at p.2. This advice from Attorney General Meyer should be compared with later advice provided by LSO on the subject of diverting funds in the general appropriations bill from one purpose or account to another, as discussed below.

⁷¹ Wyoming Attorney General Informal Opinion, p.2 (May 3, 1988).

⁷² This memo limits analysis of court decisions to only those states with similar constitutional requirements as Wyoming.

Based on the court opinions specified and our interpretation of the express language of the Wyoming Constitution, it is our opinion that the Wyoming Constitution permits only appropriations for the ordinary expenses of the three branches of government, interest on the public debt and the public schools to be included in general appropriations bills. Special appropriations, and all program or policy changes incorporated into the substantive law, other than general recodifications or revisions, must be included in separate bills, each embracing one subject.

Focusing on the single subject limitation in the same memo, LSO noted, “[i]f a bill addressing substantive law cannot itself contain more than one subject under the Wyoming Constitution, the question of whether that provision of the Constitution is being violated, or at least circumvented, is certainly raised if substantive law issues are allowed to be included in general appropriations bills - in effect creating omnibus bills. If creation, amendment or repeal of substantive law can be included in a general appropriations bill, without limitation, the single subject rule is rendered meaningless.”⁷³ Subsequent to all of these LSO memos, the LSO addressed the issue of whether a general appropriations bill could contain an amendment to existing statute which had the effect of extending the diversion to the budget reserve account of revenues that otherwise would be deposited in the permanent mineral trust fund according to statute rather than the Constitution. That LSO memo noted the general rule prohibiting substantive legislation in general appropriations bills but noted “there is an exception in that temporary modifications to substantive law may be permissible in an appropriations bill if the substantive law is related to, connected with and incidental to the subject of the appropriation.”⁷⁴

In discussing the exception, the memo stated:

A temporary modification is one that would last for no more than the duration of the budget bill. Thus, an allowable amendment would at most be effective until ...the term of the budget discussed during the [applicable] session will end.

⁷³ This section of the LSO memo perfectly captured a finding in the Delaware case of Turnbull v. Fink, 668 A.2d 1370, 1383-1384 (Del. 1995), decided years after the LSO memo was issued:

If an appropriation act contains substantive, non-financial legislation, it then becomes precisely the kind of omnibus bill the single-subject and title rules were meant to prohibit. Accordingly, an appropriation act is an improper place for an enactment of matters unrelated to appropriations. Otherwise, the purpose behind the single-subject and title rules would be meaningless, since they could be circumvented simply by putting a substantive change into legislation otherwise primarily devoted to appropriations. Consequently, those courts which have considered the issue all conclude: While under the Constitution general appropriation bills are exempted from the general constitutional provision which requires that all bills must contain but one subject, which must be clearly expressed in the title, it does not follow that general laws may be amended, modified, or repealed by a general appropriation act under such a general title. (internal citations and emphasis omitted).

⁷⁴ Citing State ex rel Whittier v. Safford, 214 P. 759 (N.M. 1923).

The memo reviewed the situation presented and concluded that given those precise facts a strong argument could be made that the proposed provision was constitutional. The argument was that the money would not be available for appropriation unless it were diverted through the proposed temporary modification. The modification was temporary since it expired at the end of the budget period that the appropriations bill addressed. The memo also noted past practice by the Wyoming Legislature of making similar temporary amendments.⁷⁵ This exception was discussed in a later LSO memorandum in the context of extending a tax. The LSO stated:

Even where there might be support that a provision in a budget bill is connected with and incidental to the appropriations contained therein, it is difficult to suggest that a court would uphold the extension of a tax in a general appropriations bill. Diverting or appropriating existing revenues for the expenses of government in a general appropriations bill is arguably related to, connected with and incidental to those appropriations. Extending a tax changes the fundamental purpose of the bill from one of appropriating funds to raising revenue which would likely violate Wyo. Const., Article 3, § 20.

In the context of a budget bill provision appropriating funds for a school outside of the usual educational funding model and other conditional language, LSO advised:

The proposed language for the budget bill would not follow the general statutory structure created for construction of schools approved in Campbell IV. The constitutional structure in place is certainly not the only one which could be developed, and departure therefrom would not in itself necessarily give rise to a constitutional infirmity. Indeed, Campbell IV noted that the Legislature had given specific instructions to the SFC; and the Court also commended the Legislature in acting to increase the speed of repair or replacement. "This continued aggressive legislative oversight over capital construction is obtaining results as part of a constitutional statutory scheme." Not only is continued legislative oversight appropriate, it might be required in order for the Legislature to ensure constitutionally compliant facilities are provided, should the local school districts or the executive department fail in executing the legislatively funded remedies.

But the means selected for that oversight must be considered in light of the separation of powers limitations, limitations on general appropriations bills, and the special legislation limitation to the extent it might apply. To adopt the language in legislation would forego the constitutionally approved system outlined above and would not establish the same record for potential court review provided by that constitutional system.

⁷⁵ While neither took a firm position, this advice renders a different "possible court holding" than earlier advice provided by the Attorney General on the subject of diverting funds in the general appropriations bill from one purpose or account to another.

The above appears to be the general written guidance provided to Wyoming legislators on the limits of substantive law in general appropriations bills.⁷⁶ Many other states' courts have addressed this issue. The Supreme Court of New Mexico described the purpose of constitutional provisions requiring single subjects in bills, while noting the constitutional restrictions on the content of general appropriations bills and stated: "To sustain the contention that the general appropriation bill should contain nothing, save the bare appropriations of money, and that provisions for the expenditure of the money, or its accounting, could not be included therein; or that the method and means of raising the money appropriated could not likewise be included, would lead to results so incongruous that it must be presumed that the framers of the constitution had no such intent in the adoption of the restrictions referred to."⁷⁷ More directly the Court stated:

When an appropriation is made, why should not there be included with such appropriation matter germane thereto and directly connected with it, such as provisions for the expenditure and accounting for the money, and the means and methods of raising it, whether it be by taxation, or by some other method?⁷⁸

Thus it appears that New Mexico would potentially allow revenue raising measures within its budget bill.⁷⁹ The Supreme Court of Ohio has additionally indicated it would approve revenue raising measures in a budget bill as incidental to the appropriating of state funds.⁸⁰

⁷⁶ Additionally, the following observations regarding potential constitutional issues concerning the general appropriations bill have been made by LSO:

1. When a budget provision is contrary to existing law on a subject, the issue of amending law by reference (Article 3 § 26) also is implicated.
2. A budget provision addressing treatment of a particular issue might be called into question by the prohibition on special laws in violation of Article 3 § 27.
3. If a provision can be classified as one for the raising of revenue under Article 3 § 33, the requirement that all bills for raising revenue shall originate in the house of representatives must be considered.
4. Article 3, § 36 provides that "[n]o 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."

⁷⁷ State ex rel. Lucero v. Marron, 17 N.M. 304, 314-15 (N.M. 1912).

⁷⁸ Id. at 315-16

⁷⁹ Note that this would be contrary to the advice provided by LSO regarding the extension of a tax in a general appropriations bill.

⁸⁰ Ohio courts have approved provisions in that state's budget bill which: amended taxation statutes (ComTech Sys., Inc. v. Limbach, 570 N.E.2d 1089 (Ohio 1991); reformed workers' compensation laws (Ohio AFL-CIO v. Voinovich (Ohio 1994)); and amended state water pollution standards (Rivers Unlimited v. Schregardus, 685 N.E.2d 603 (Ohio C.P. 1997)).

While these two states may not be alone in this view, it is fair to state that they represent the permissive end of the spectrum of views on the appropriate content of a budget bill. Colorado represents the restrictive end of that spectrum.

The Colorado Supreme Court has stated, “The framers of the [Colorado] constitution never contemplated that this bill would be used for the twofold purpose of creating laws and then appropriating money to carry them into effect. Affirmative legislation, as well as special appropriations, are otherwise provided for in the constitution.”⁸¹ The Colorado court further stated “[t]he legislature is prohibited from including substantive legislation in a general appropriations bill.”⁸² The Colorado court has struck down the following budget bill provisions: (1) a provision which place conditions on the number of full-time employees in each county; (2) the requirement that the Joint Budget Committee approve rate increases in certain contracts; (3) a provision that made appropriations contingent upon presentation of cost-benefit reports and five year plans to the General Assembly; (4) the funding of full-time employees contingent on case-load; (5) the requirement of monthly reports to the budget committee; and (6) specify staffing and resource allocation decisions.⁸³ Additionally, the Colorado court held that, “it is not within the General Assembly's power to require that any federal or cash funds received by any agency in excess of the appropriation . . . be expended without additional legislative appropriation, because such funds are custodial in nature and not subject to the appropriative power of the legislature.”⁸⁴

Yet despite those holdings, even the Colorado Supreme Court has acknowledged that “[t]he General Assembly maintains the exclusive authority to enact legislation, including appropriations. The legislature's power over appropriations is plenary, subject only to constitutional limits, and includes the power to attach conditions on expenditures.”⁸⁵

Most states which have a judicial decision on this general issue, and constitutional provisions similar to Wyoming, appear to fall somewhere between the New Mexico/Ohio and Colorado extremes. A more moderate expression can be found from the Florida Supreme Court:

The important matter of providing appropriation for the operation of the government of the State of Florida should not be prejudiced by the injection into the appropriation of any other subjects, regardless of their inherent merits or demerits, unless such other subjects are so relevant to, interwoven with, and interdependent upon the appropriations so as to jointly constitute a complete legislative expression on the subject.⁸⁶

⁸¹ Clement v. Spruance, 6 P. 831, 839 (Colo. 1885).

⁸² Colorado General Assembly v. Owens, 136 P.3d 262, 266 (Colo. 2006).

⁸³ Id. at 268 (citations omitted).

⁸⁴ Id. (citations omitted).

⁸⁵ Id. at 266.

⁸⁶ Dickinson v. Stone, 251 So. 2d 268, 274 (Fla. 1971).

The Supreme Court of Kansas has stated that, “[a]ppropriation bills may direct the amounts of money which may be spent, and for what purposes; they may express the legislature's direction as to expenditures; they may transfer funds from one account to another; they may direct that prior unexpended appropriations lapse. But we hold that . . . appropriation bills may not include subjects wholly foreign and unrelated to their primary purpose: authorizing the expenditure of specific sums of money for specific purposes.”⁸⁷ The Alabama Supreme Court has stated, when interpreting a constitutional provision almost identical to Article 3, Section 34, “the legislature should not be permitted to use a general appropriation bill as a means to repeal provisions of law establishing departments and agencies and granting to those departments and agencies the power to hire necessary employees and to make necessary purchases of equipment.”⁸⁸ The Louisiana Supreme Court stated, “[i]nherent in the power of appropriation is the power to specify how the money shall be spent . . . the legislature may include in an appropriation bill qualifications, conditions, limitations or restrictions on the expenditure of funds which would not be dealt with more properly in a separate bill . . . inherent in the power of appropriation is the power to specify how the money shall be spent.”⁸⁹

The Pennsylvania Supreme Court adopted a three-pronged test developed by the Pennsylvania Commonwealth Court to determine whether the content of the budget bill exceeds constitutional authority: The first prong of the test requires that the questioned provision be germane to the appropriation; the second prong of the test requires that the provision not conflict with, alter or amend existing legislation; the final prong of the test requires that the particular measure at issue not extend beyond the life of the appropriations bill itself.⁹⁰

The Commonwealth court in applying the test to the facts of the case upheld a provision in a supplemental appropriations act limiting the class of full-time college or university students who were eligible to receive general financial assistance payments from the Pennsylvania Department of Public Welfare (DPW). “Specifically, the questioned language in the appropriations bill noted that after January 1, 1978, none of the monies appropriated therein could be used to pay general assistance funds to any student who had not participated in a federally subsidized program for dependent children.”⁹¹ The Commonwealth court “concluded that the limitation, or directive on the manner of spending, was germane to the appropriated public assistance funds, did not

⁸⁷ *State ex rel. Stephan v. Carlin*, 230 Kan. 252, 258 (Kan. 1981).

⁸⁸ *Opinion of the Justices*, 582 So. 2d 1115, 1120 (Ala. 1991); *See also Flanders v. Morris*, 88 Wn.2d 183, 558 P.2d 769 (Wash. 1977), wherein the Washington court struck down a provision in a general appropriations law which prevented a certain class of people from collecting public assistance because the appropriations bill language conflicted with an already existing general law.

⁸⁹ *Henry v. Edwards*, 346 So. 2d 153, 157 (La. 1977). Applying this standard to the particular budget bill language at issue in the case, the Louisiana Supreme Court stated, “[w]hile the stricken provision is couched in language suggestive of a condition or limitation, its essential purpose is to insure that equipment purchased by the state meets certain safety standards. This concern is more appropriately addressed in general legislation since it is a substantive expression of state policy on safety. The provision is not directed to the expenditure of funds in a budgetary sense.” *Id.* at 164.

⁹⁰ *Hosp. & Healthsystem Ass'n of Pa. v. Dep't of Pub. Welfare*, 585 Pa. 106, 118-120 (Pa. 2005) (citing *Biles v. DPW*, 44 Pa. Cmwlth. 274, 403 A.2d 1341, 1342 (Pa. Cmwlth. 1979)

⁹¹ *Id.* at 120.

conflict with any other existing legislation, and did not extend further than the life of the appropriation itself.”⁹² Applying the test to another case, the Pennsylvania Commonwealth court struck down language that conflicted with DPW regulations on start dates for medical assistance because DPW was provided statutory authority to set those start dates by rule.⁹³ The Pennsylvania Supreme Court utilized this test to strike down a provision in a general appropriations act which capped certain DPW's fee-for-services rates when existing law allowed providers to negotiate for their fee.

The Delaware Supreme Court has adopted a modified version of the Pennsylvania test. While the Pennsylvania courts appear to hold that a violation of any of the three prongs of the test would invalidate the contested provisions, the Delaware Supreme Court considers the prongs as “factors” to help guide the determination of whether a provision in a general appropriations bill may violate constitutional requirement:

While appropriation bills must contain no other substantive provisions than appropriations matters, this does not mean that an appropriation bill must merely be a list of monetary appropriations and respective recipients. ... Factors which indicate that language in an appropriation bill is not merely "conditional" or "incidental," but rather is improperly substantive are: first, the provision is not germane to any appropriation in the appropriation bill, second, the provision amends or repeals an already existing law; and third, the provision is permanent in nature, extending beyond the life of the appropriation act.⁹⁴

The South Dakota Supreme Court appears to apply a test closer to the Delaware Court, finding that a budget bill can amend an existing law dealing with an appropriation. While holding that the legislature may not pass substantive legislation in the general appropriations bill, the South Dakota court held that “the Legislature has power to alter, change, or transfer a prior appropriation” and, “the Legislature can use a general appropriations bill to modify an existing law directed at appropriations.”⁹⁵ A divided South Dakota court upheld provisions of the general appropriations act which altered existing law by reappropriating funds contained in the South Dakota Bred Racing Fund and the Special Racing Revolving Fund to the general fund.⁹⁶ The South Dakota Supreme Court held that an appropriations bill could change or amend existing laws relating to appropriations, at least for the period of the budget bill.⁹⁷ In so holding, the South Dakota Court distinguished its facts from a similar Florida case:

⁹² *Id.* at 122.

⁹³ *Id.* 123 (citing *Wesbury United Methodist Community v. DPW*, 142 Pa. Commw. 353, 597 A.2d 271 (Pa. Cmwlt. 1991), *aff'd* 533 Pa. 85, 619 A.2d 1057 (Pa. 1993)).

⁹⁴ *Turnbull v. Fink*, 668 A.2d 1370 (Del. 1995) (internal citations and emphasis omitted).

⁹⁵ *Apa v. Butler*, 2001 SD 147, ¶¶15 and 20 n.5 (S.D. 2001) (“Given the administrative aspect of appropriations bills, the legislature has power to alter, change, or transfer an appropriation, unless the appropriation has been pledged by constitutional or statutory provisions to the payment of some obligation under circumstances where the charge on such appropriation has become a vested right.” (internal citations omitted)).

⁹⁶ *Id.* at ¶¶ 8-9.

⁹⁷ *Id.* at ¶¶ 17-18.

In another Florida case, Chiles v. Milligan, 682 So. 2d 74 (Fla 1996), the governor petitioned the Florida Supreme Court for a writ of mandamus declaring certain conditions in the general appropriations bill unconstitutional. The conditions were placed upon the expenditure of funds appropriated for certain programs. However, preexisting statutes already contained guidelines directing how funds appropriated to those programs should be spent. The Florida court struck down the conditions holding that they would unconstitutionally amend or change an existing law on a subject other than appropriations. Our case, however, presents a different scenario than that confronted in Chiles. Nothing in [the South Dakota General Appropriations Act] purports to amend or change the purposes for which Bred Racing Funds or Racing Revolving Funds may be spent. Rather, *the bill transfers funds previously subject to a continuing appropriation for those purposes to the general fund and reappropriates those funds*. As Chiles itself notes, "an appropriations bill can, of course, modify an existing law directed at appropriations."⁹⁸

LSO cannot predict whether the Wyoming Supreme Court would adopt the Pennsylvania or the Delaware test (or either test for that matter). As LSO noted over twenty years ago, it does not appear unreasonable to assume that with the power to appropriate for the ordinary expenses of government, support of the public schools and interest on the public debt, the legislature may redirect funds already dedicated to an ordinary expense of government, to *other* ordinary expenses of government, for the term of the general appropriations bill. What should be noted is that a court might well draw a distinction in the reallocation of funds if a continuing appropriation guarantees a sum certain amount in existing law. In those cases, the legislature's authority to reduce or repeal that amount in the general appropriations bill is likely more suspect.⁹⁹

Separation of Powers

LSO has also advised legislators that overly restrictive measures and conditions in a general appropriations bill may unduly infringe on executive branch authority in violation of Article 2, Section 1 of the Wyoming Constitution.

As previously stated, the Legislature does not act under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the Constitution, and as a rule, therefore, a legislature may do what the state and federal constitutions do not prohibit. The Wyoming Constitution does prohibit the Legislature, and the other branches from exercising powers conferred on the remaining branches. While it is within the legislative purview to

⁹⁸ Id. at P19.

⁹⁹ See Carter, 31 Wyo. at 408 (discussing State ex rel. Henderson v. Burdick, 4 Wyo. 272 (Wyo. 1893)), "We do not think it necessary to our decision in this case, to pass upon the question thus suggested, but deem it sufficient for present purposes to say that an intention to make an appropriation would be more readily implied in a case where the claims to be paid were fixed and definite than in a case where the amount to be drawn from the treasury could not be foretold."

declare what is in the interest of the state, through the enacting of legislation, it is incumbent upon the Governor to "expedite all such measures as may be resolved upon by the legislature and shall take care that the laws be faithfully executed."¹⁰⁰

At the same time the Supreme Court has acknowledged that Wyoming's Constitution does not require "airtight" branches of government.¹⁰¹ While not put in these terms by the Wyoming Supreme Court, LSO has previously noted that a succinct standard by which a legislative action can be evaluated under the separation of powers doctrine is whether (1) the legislature is improperly intruding on a core zone of executive authority, impermissibly impeding the Governor in the exercise of his executive authority or functions, or (2) the legislature is retaining undue legislative control over executive actions.

Courts in other states have held that the legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of funds appropriated.¹⁰² However, courts have also limited that authority such that the legislature may not attach conditions to a general appropriations bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character.¹⁰³ "Conditions which purport to reserve to the legislature powers of close supervision that are essentially executive in character" are impermissible.¹⁰⁴ One example: Reserving oversight of rate increases for child care facilities to a joint budget committee was held to unconstitutionally infringe on the executive's power to administer appropriated funds.¹⁰⁵

Conclusion

LSO cannot predict how a Wyoming Court deciding a case challenging a provision of a general appropriations bill would rule. The above identifies Constitutional restrictions and pertinent Wyoming legal authority as well as case law from other states applying those constitutional restrictions. In many instances there is no universally agreed upon standard. At the same time there are items that appear universally, or nearly universally, agreed upon as violating one or more of the constitutional limitations. This memorandum attempts to identify those.¹⁰⁶

As with other legislation, LSO's role is to advise on Constitutional and other potential issues. It is for each house acting separately to initially determine the constitutionality of its actions and

¹⁰⁰ Wyoming Constitution Article 4, Section 4.

¹⁰¹ Billis v. State, 800 P.2d 401, 413-15 (Wyo. 1990).

¹⁰² See, e.g., State v. State Board of Finance, 367 P.2d 925 (N.M. 1961).

¹⁰³ Colorado General Assembly v. Owens, 136 P.3d 262, 266 (Colo. 2006).

¹⁰⁴ Anderson v. Lamm, 579 P.2d 620, 623 (Colo. 1978). See also State ex rel. Coll v. Carruthers, 759 P.2d 1380 (N.M. 1988).

¹⁰⁵ Anderson, 579 P.2d at 627.

¹⁰⁶ This memorandum does not separately address the issue of amendments to general appropriations bills. Just as the introduced bill, an amendment is subject to the constitutional limits on general appropriations bills. Further, amendments are subject to Article 3, § 20, which mandates that, "no bill shall be so altered or amended on its passage through either house as to change its original purpose."

ultimately for each to enact identical legislation to present to the Governor. The review of the constitutionality of legislation proceeds from that point through the Executive and perhaps ultimately to the judiciary.

In fulfilling its initial duties, the Legislature could consider developing a tool through which the body can police potentially unconstitutional provisions in a general appropriations bill. Such a tool is likely to take the form of a joint rule of the House and Senate. The House of Representatives passed such a rule during the 1989 session. It is our understanding that the Senate did not consider the proposed joint rule prior to the adjournment of that session.