

MINUTES OF SPECIAL CALL MEETING
BOARD OF REGENTS OF HIGHER EDUCATION
MONTANA UNIVERSITY SYSTEM

DATE: August 22, 1991

TIME: 1:00 p.m.

LOCATION: Helena Vocational-Technical Center
1520 North Roberts
Helena, Montana

REGENTS PRESENT: Chairman Mathers; Regents Kaze; Johnson;
Schwanke; Topel; Boylan; Rebish
Commissioner of Higher Education John M.
Hutchinson

REGENTS ABSENT: None

PRESIDENTS
PRESENT: Presidents Dennison; Malone; Carpenter;
Norman; Daehling
Provost Easton

PRESIDENTS ABSENT: None

The Budget Committee of the Board of Regents met in executive session on collective bargaining issues from 11:00 a.m. to 12:00 Noon.

Chairman Mathers called the special call meeting to order at 1:00 p.m.

Chairman Mathers introduced and welcomed to the Board newly-appointed student Regent Kathey Rebish. Regent Rebish is a student at the University of Montana, and will serve a term ending June 9, 1992. She replaces student Regent Brad Musgrove.

Review of Purpose of Meeting

At the Chairman's request, Commissioner of Higher Education Hutchinson reviewed the purpose of the special call meeting. He explained that on August 12, 1991, a memorandum

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was received from the Governor's Office of Budget and Program Planning requesting higher education to participate in a budget recission on the order of 8% per year of the biennium. Particular areas were suggested for the recission, including the administration program (OCHE), the student assistance program, the community college assistance program, minority achievement, vocational-technical appropriation distribution, Carl Perkins appropriation, the appropriation to the colleges and universities, the Board of Regents' administration, the Regents' bond payment, and vo-tech center administration. The Budget Office requested a response by August 21, 1991.

Dr. Hutchinson noted he did not believe it appropriate for the Commissioner's Office, ex cathedra for the Board and for the campuses, to respond to the work sheet without having some sort of special meeting. That is the purpose for which this meeting is called. The Budget Office was notified the August 21 deadline would not be met. That office indicated its satisfaction that the complexity of the higher education organization was such that the deadline could be extended.

Dr. Hutchinson stated he believed the discussion should evolve around two fundamental questions: (1) should higher education participate in the budget recission, and to what extent; and (2) what would be the appropriate strategies for responding to the Governor's request through his Budget Office. The amounts would be in the neighborhood of \$10 1/2 million in each year of the current biennium, for a total of \$21 million as higher education's contribution.

Comments by the Chairman

Chairman Mathers explained he met yesterday with Governor Stephens to discuss the reductions proposed in the Montana Systems of Higher Education's budget for FY 92 and FY 93. Chairman Mathers made the following statement for the record:

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The Governor is concerned, and rightfully so, about the economic condition of our state and the downturn in revenue collections to the general fund.

As any prudent businessman would do, seeing this shortfall in revenue, adjustments must be made in the spending pattern. This he has done.

As the recipient of the largest share of the general fund expenditures, we too must be concerned.

Having said that, however, we must remember that we alone are responsible for maintaining quality education for the students in higher education in this state. In our deliberations today let us not lose sight of that very important responsibility. We must maintain the high standards the public expects from the University System of this state. Chairman Mathers added he hoped the deliberations today will be held in that fashion.

The Financial Impact

Deputy Commissioner for Management and Fiscal Affairs Jack Noble distributed and reviewed three documents. The first, titled "What is the Magnitude of the Proposed Budget Reductions?" (on file) provides "equivalent to" comparisons. Mr. Noble cautioned these are in no way to be interpreted as recommendations or options, they simply provide equivalencies. In summary: \$21 million over the biennium; affects all areas of post-secondary education. Is equivalent to 100% of NMC and WMCUM general fund budgets; 100% of Montana Tech and Bureau of Mines general fund budget; 92% of EMC's general fund budget; 83% of the five vo-tech centers plus the three community colleges general fund budgets. Is the equivalent of 270 FTE faculty positions, or over 50% of MSU's faculty; 62% of all classified employees in the system. In addition, the document listed equivalencies of the items funded by the last legislature; tuition would have to be increased by 43% (\$432 per full-time student per year) to compensate for the reduction.

Mr. Noble explained also the required shifting that would have to occur because certain targeted sources of funds

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cannot be reduced, resulting in a much more than 8% reduction in some areas to compensate for those areas where reduction is not possible.

Mr. Noble spoke also to the question frequently heard, "why are cuts such as those proposed so difficult for higher education? Why is higher education not like just another state agency?" Looking at the differences, Mr. Noble noted 60% of higher education's personal service budgets involve individual contracts with faculty and professional staff. Of that 60%, 65% of faculty are tenured, with some institutions going as high as 84% tenured faculty. No matter what approach the Board or the campuses decides to take, there is no way to remove tenured faculty in this biennium. There is no way an academic program can be eliminated within the timeframe of the call back. On the operating side, 19% of the System's budgets are caught up in operations - non-personal services. Analyzing those expenditures, you will find utilities comprise 22%. In a Montana climate the heat can not just be turned off. Rent, communications, and contracted services comprise another 44% of the budgets, with well over 90% of those as fixed costs. Two-thirds of operations costs, then, are not able to be reduced.

Asking what is escapable, what funds can the System shift, the normal response would be travel, portions of supply budgets, maintenance, and capital expenditures. All in this room and in the legislature are aware of the problems the System faces with deferred maintenance. This is in part the result of having to go against deferred maintenance budgets in the past. While some relief was provided in the area of capital equipment budgets by the last legislature, which was sorely needed in large part to meet accreditation standards, can that really be called an escapable cost. Probably not, if quality is the objective.

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Next Mr. Noble reviewed a "snapshot" of post-secondary education in Montana (on file). The middle column shows the operating budget as it now resides awaiting approval by the Board at the September meeting. The third column provides a preliminary draft of that budget after meeting the requested 8% reduction. The remaining columns show the units' budgets after the 8% general fund decrease and show the reduction in percent of budgets for each unit. The total percent increase after the 8% call back for the System would be 3.99%; previously at 9.93%, with the enrollments budgeted to increase 2.11%. After adjusting for the enrollment increase, the System would have only a 1.88% real dollar increase.

Mr. Noble reviewed the impact of the call back on the vocational-technical system. There were serious problems with those budgets coming out of the legislature; after the call back the vo-tech centers would be down \$85,490 from the previous biennium budgets. The general fund portions of the community colleges budgets are also in the call back. The state sets those budgets on a state to local ratio. That state level of funding is used to set the local mill levy in August; those have been set to meet that ratio. The call back affects the legislative intent of that ratio. It certainly gives rise to question of what happens to the local mill levy already set.

Mr. Noble concluded his presentation with a review of a third document, "Montana System of Higher Education Schedule of General Fund Reductions 8% by Agency" (on file). He cautioned again that because the reductions were applied against contractual bond payments and student assistance, there would have to be a Regents' decision to re-target the reductions if such action was taken. When you remove 8% from one category, and reapply it to another, the result is a much larger than 8% reduction in some portion of the budget.

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The Legal Situation

Chief Counsel Schramm stated he would speak to three areas: (1) substantive legal issues involved in a gubernatorial call back of appropriated funds; (2) issues of forum if a legal challenge was to be made; and (3) reflections on the Board of Regents' role with regard to litigation.

Dr. Schramm referenced his August 16, 1991 memorandum to the Board of Regents titled "Gubernatorial Rescission of Appropriations" (on file) which was distributed to all interested parties prior to the meeting. He noted that when one governmental agency is talking about what legal options it has against another, the Supreme Court has clearly stated those discussions should be open. Today both the spirit and the letter of that dicta is being met. He noted that while the list of arguments that potentially could be made are being discussed in today's meeting, the strengths and weaknesses of the various arguments should probably not be debated.

Dr. Schramm then reviewed the summary of legal options available to contest the requested reductions contained in the memorandum. Those are: (1) the statute authorizing the call back may be unconstitutional because it improperly delegated to the executive branch the legislature's exclusive appropriation authority; (2) under the Montana Constitution monies appropriated to the Regents cannot subsequently be diverted to non-higher education purposes; and (3) even if the budget rescission statute is constitutional, the conditions necessary to invoke it are not present.

Dr. Schramm also proposed a fourth argument which he explained he did not have sufficient time to fully research. That would be the argument that after examination of the few sources of discretionary funds the Regents would truly be able to access to meet the call back, it would seem that while not

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verging on an absolute impossibility, one might say this kind of call back would put the Regents in such a position that it is an actual infringement on their constitutional authority to manage.

Dr. Schramm concluded his review stating that while no one can say the arguments presented can not be stated unequivocally as winning arguments, because no one knows beforehand how a court will react, the arguments, taken as a whole, are substantial enough so that legal action can be looked on as a viable option.

Speaking next to the forum, if legal action is selected as a desirable course of action, those decisions come from three places: (1) the Attorney General; (2) the Supreme Court; and (3) a District Court. The conditions under which you go to any of these forums differ. The Attorney General takes questions with a given set of facts, to which he applies the law. The last several Attorneys General have declined questions of constitutionality. The Supreme Court takes both appeals and cases of original jurisdiction. To invoke the Court's original jurisdiction two conditions are needed: (1) an emergency exists where time is of the essence; and (2) it must be a question of law. They certainly address constitutional questions. A District Court is a residual, or court of general jurisdiction.

Dr. Schramm reviewed the issues that would be involved in any legal action contemplated by the Regents, concluding in his evaluation the proper forum would be the District Court. However, that does not need to be decided at this time.

Reflecting on the Board's role regarding litigation, Dr. Schramm explained the non-diversion clause first appeared in the appropriations act every year since 1971; for the first time this year it has been codified in statute. Governor

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Schwinden exercised two call backs, one in FY 1986, the next in FY 1987. The Regents acquiesced in both of those. There were lawsuits resulting from terminations occasioned by those reductions. A rhetorical question to ask then is, at what point does it become very difficult to challenge something that is an on-going, long-standing process that has been acquiesced in? At some point that factor becomes important; how do you weigh that factor? Dr. Schramm suggested the decision should be depersonalized. The Board as a whole is indeed agonizing over the question of litigation. But rather than viewing it from the point of "Regent A, or Regent B, or Regent C", the view should be that the Regents collectively are sitting here as the voice of the University System. Staff can provide statistics; faculty can complain; students can stamp their feet; the presidents provide their point of view - but none of those groups are the voice of the University System. That is the responsibility the Constitution has given to the Board of Regents alone. If each Regent can view him/her self as part of that voice, rather than as an individual Regent, it might make it easier to analyze the issues. When the Board of Regents, in 1975, filed suit against the sitting Governor to declare an act of the Legislature unconstitutional it resulted in the case Board of Regents vs. Judge. Dr. Schramm noted that while he was not part of the System when that occurred, he suspected there was some of the same agonizing then that is occurring now. That Board, as a body, left the System what Dr. Schramm called a bequest that the System has been living off of for sixteen years. The matters at issue today may not go to the heart of Regents' governance authority as directly as they did in the 1975 action. In some ways the issues today are really appropriation, not governance, issues. But this is probably the first time since Judge where the Board has had to

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deal with an issue of this magnitude and decide whether a legal action will be exercised or not. Dr. Schramm stated that just as if each Regent would depersonalize it from his own side, it might be helpful if everyone depersonalized it. He stated if the Board chooses to take legal action, he would not view that as a personal challenge to the Governor. Dr. Schramm stated he did not believe that anything that has happened to date in the call back scenario at all reduced his admiration for Governor Stephens integrity; to the contrary, what has happened so far has increased Dr. Schramm's admiration for the Governor's courage. These are agonizing decisions for the Governor as well. He is exercising his powers as given to him on the face of the statute. Going to him, saying the University System does not believe this is a proper statute, does not impugn the Governor in any personal way. This has to be viewed as a pulling and tugging of institutional forces that is natural in any government that has checks and balances. If the Board of Regents chooses legal action, Dr. Schramm stated he believed this says to the Governor, to the rest of the state, to anyone, that the Regents are the voice of the University System, and they believe this issue is so vital that it needs an authoratative answer on whether or not this process is consistent with the system of checks and balances and the processes the people of this state have ordained in their governmental system. That is not a personal issue.

Comments and Recommendations of the Commissioner

Commissioner Hutchinson made the following comments:

It was Sir Francis Bacon who said that "conversation maketh a ready man, reading maketh a prepared man, and writing maketh an exact man." Because of the gravity of what we are about to discuss, I believe exactitude is of the essence and so I ask that you indulge me with the reading of a prepared statement that presents my recommendation to this Board of Regents.

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I shall offer my remarks in three brief sections. First, I think it important to review the history of financial support for higher education in Montana. Second, it would do us all well to be reminded of the reasons for the creation of a Board of Regents. Third, I will provide a succinct statement of my position which logically follows from the points made in the first two sections.

Funding for Higher Education in Montana

The recent history of funding for higher education in Montana has been virtually an unending litany of inadequacy. That inadequacy may be presented in bold relief with six brief statements:

1. Just one decade ago, funding levels for higher education in Montana matched the averages of our peers. Today, ten years later, our funding levels are roughly 80% of our peers.
2. Montana ranks dead last among the states in per student need-based financial aid. In 1989-1990, our average award of \$320 was nearly 30% below that of Puerto Rico!
3. Montana and South Dakota share the unenviable distinction of ranking 49th and 50th in the nation in faculty salaries.
4. The number of volumes held in our campus libraries is substantially below accepted standards issued by the Association of College and Research Libraries. In one case, Montana State University, the number of volumes is only 50% of that specified by the standards.
5. The Montana University System, which comprises 60% of the total square footage of all state buildings, is lumbered with nearly \$30 million in critical deferred maintenance. (Addition to prepared statement: Noting from reading the paper this morning that \$600,000 in deferred maintenance money appropriated to the Department of Administration has been offered up as 2/3rds of their response to the budget recission.)

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6. Recent data issued by the American Association of State Colleges and Universities have revealed that since 1984, Montana has slipped from 13th to 39th in per capita appropriations for higher education. That is a slippage of 26 ranks, by far the largest slippage in the nation.

The Legislature and the Governor were good to higher education during the 52nd session, given the revenue available to the state. It is quite clear that higher education was a priority of this last legislative assembly and we can say with gratitude that we received the best increase in at least one and, perhaps, two decades. Alas, it was not enough to allow us to make significant progress in our efforts to reach peer averages in per student funding levels.

I was once asked, "how much does it really take to run a university system?" I replied, "it takes as much as you have." That was not a flip comment. We must live within the budget we are given by the people of the state. If it is not enough to allow us to maintain and enhance our quality, then we must trim the system to fit the appropriations that come to us from the legislature. This Board of Regents has, with great courage, embarked on a five-year Commitment to Quality effort that will bring us to the level of our peers in per student expenditures by trimming the system and serving smaller student populations. The Commitment to Quality project will be a thoughtful, systematic, and gradual process. The gubernatorially proposed budget reduction and the time frames within which we are asked to respond are violent and disruptive to the deliberate efforts of this Board to reduce the size of the system.

The Role of a Lay Governing Board of Regents

In attempting to develop a response to this call for a 16% biennial budget reduction, it is instructive to revisit the fundamental role of a lay governing Board of Regents. Any public college or university owes its existence to society. Therefore, it is entirely appropriate that governance be vested in a lay board which has a three-fold responsibility. First, such a board must represent the public's interest to the college or university. Second, the board must represent the interests of the institution back to the public. Third, the Board serves as a critical buffer to protect higher education from political changes in fortune and from the bureaucratic dictates of other state agencies.

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It is this third responsibility that I wish to dwell upon for a moment more. If you will allow me, I would like to turn back the pages of history to March 11, 1972, and echo the remarks of Mr. Richard J. Champoux, a delegate to the Montana Constitutional Convention. Mr. Champoux discussed the need for a lay Board of Regents. Listen again to what he said:

Higher education is not simply another state service. The administrative structure of higher education cannot be considered an ordinary state agency. The unique character of the college and university stands apart from the business as usual of the state. Higher learning and research is a sensitive area which requires a particular kind of protection not matched in other administrative functions of the state....strict adherence by institutions of higher learning to a bewildering array of centralized bureaucratic controls will ultimately endanger the academic as well as the administrative freedom of the colleges in this country. Among the sources of growing controls which increasingly impinge upon universities are state budget offices, state auditors, comptrollers, purchasing departments, personnel offices, central building agencies and a variety of older forms of control...The power to coordinate and operate the system of higher education is one which belongs primarily, properly, to an informed Board of Regents who have the knowledge and ability to determine rationally the course of higher education.

The proposed 16% cutback which, as Dr. Schramm has already pointed out, may be legally flawed, vaults the Montana Systems of Higher Education into an irrational process of budget reduction. This is precisely why our 1972 Constitutional Convention anticipated the formation of a governing Board of Regents: to guard against such encroachment with all of its attendant irrationalities.

The Commissioner's Position

Given the disastrously low levels of funding endured by Montana's higher education community for at least the past two

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decades and given the need to resist the changing winds of political fortune that intrude irrationally upon the governance of higher education, I urge this Board to decline immediate participation in the budget cutbacks. A cut of this magnitude will do almost irreparable damage to the whole fabric of public post-secondary education in this state. If we do this deed, we will not recover for decades and the ultimate loser is the state itself. No modern society moves forward when its educational engines are crippled.

Instead, I recommend that this Board proceed along two tracks. First, I believe the Board has an obligation to discover once and for all whether or not a governor may require higher education to participate in budget reductions. Accordingly, I believe we should seek a judgment on this matter in an appropriate court of law. Second, it would be impudent simply to wait for this judicial determination and defer further consideration of where budget cuts might be made. If and when the courts determine that a governor may require higher education to respond as other state agencies in rescissions, then we must be prepared to take appropriate action in a timely fashion. However, I would remind the Board that the Montana Systems of Higher Education are extraordinarily complex in structure, policy, and fiscal management. Therefore, this Board should resist any demands for precipitous identification of rescission targets. It is critical that our response to a cut back of this magnitude be made with thoughtfulness and integrity. Our actions this day will be felt throughout Montana for decades to come. Therefore, discovery of our legal position is crucial and any response we might ultimately make must be girded by wisdom and integrity.

Comments by the Presidents and Directors

At the Chairman's request, each President, Community College President, and Vocational-Technical Center Director analyzed his particular institution showing in "equivalent terms" the magnitude of the proposed reduction. Current year's operating budgets were categorized into "escapable and inescapable costs" with evidentiary data provided supporting the statements. All indicated the 8% reduction in both years of the biennium, exacerbated by record enrollments, would drastically reduce the institutions' attempts to reach peer

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funding levels; would require tuition increases of roughly 43%+; result in loss of accreditation of most professional programs; would be equivalent to elimination of the School of Business at the University of Montana; is equivalent to the amount of the pay plan increase, libraries, accreditation, RERS; etc., amounts funded by the last legislature; is equal to 5% of the total operating budget at the University of Montana. All discussed the high percentage of the System's budgets tied up in fixed costs including contractual obligations, creating the very real situation of lack of flexibility in areas where cuts could be made. All urged the Board to attend to the recommendation of the Commissioner, and the statements of Chief Counsel Schramm regarding depersonalization of the decision, and the importance of the Regents as the "voice of the University System." None denied the System's responsibility to contribute what is determined to be a "fair share" if the budget shortfall actually occurs, but all asked that the long-term consequences be seriously considered, and that time be provided for planning so those long-term consequences can be minimized to the extent possible.

Presentation by Kirk Lacy, President, Montana Associated Students

Mr. Lacy spoke the to the devastation he believed would occur to the Montana University System if the Governor's call back of general funds occurred. He referred to the outcome of the study of the Governor's Education Commission of the 90's and Beyond which clearly stated the System was at a crossroads, and much choose a new course - more funding, or cutbacks. This Board made a commitment to quality - it would take whatever path it had to take to sustain that commitment and is indeed in the process of downsizing the System in order to sustain quality. Now the Governor asks that another road be

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taken; Mr. Lacy believed that road was fraught with danger. He pleaded with the Board on behalf of the students of Montana not to take the new direction indicated by the Governor. There is no quality down that path; he urged the Board to stay on the course it has chosen and to continue to fight for quality education for the citizens of Montana.

Discussion by the Board

Regent Johnson, recognizing his short term of involvement with the legislative process, questioned why the legislature did not know at the end of last April that the revenues appropriated would not be available. Chairman Mathers responded that he and Regent Topel had met just this morning with the Legislative Fiscal Analyst, and discussed the LFA's revenue projections in her statement to the Governor. Revenue projections are extremely difficult to make; they change almost daily. At the end of the legislative session, the legislature was aware that certain collections were not coming in as anticipated. At the same time, they did believe there would be sufficient funds to cover the general fund appropriations. Income tax collections, corporations license taxes, and mineral taxes were lower than anticipated. No one knows why. What they will be next year is anybody's guess. The actual figures will not be available until late October. The Governor has acted on the assumption those revenues will be insufficient. Chairman Mathers stated he believed the Governor acted responsibly; that is his job. The situation facing the Regents is different; they have to protect the University System. A decision has to be made; if the money is not there - what can the Regents do? He did believe it was premature to try to say the System would cut "x number of dollars" out of an unknown budget. The System needs time. Chairman Mathers stated he told that to the Governor in his conversation with him yesterday. The Board needs the Governor's help and is willing to work with him to solve these problems.

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Chairman Mathers noted that as most everyone knows he and the Governor are very good friends, and he did not want to file a lawsuit against the Governor. However, he did not know how else to resolve this problem.

Regent Topel agreed with the Chairman's statement on the need for time for planning. Cutting 8% of the general fund appropriation from the University System budget will wreak havoc. What would be even more devastating would be to take that action today, and then find out a year or two from now that while everyone acted in good faith, nonetheless the cuts turned out not to be needed and the damage to the System has already occurred. Regent Topel stated, however, that if in fact there is a shortfall, the University System has an obligation to try to help the state out in its time of need. He suggested a addition to the Commissioner's recommendation that would add a third track. If at the end of October or November 1991, it is determined there is an actual shortfall, the Board of Regents should examine the shortfall to determine if it is appropriate to make reductions. The fair share would have to be determined in the light of the severity of the shortfall, weighed again the needs of the System. Regent Topel stated personally he was not willing to support a reduction of 8% in each year of this biennium. He would commit to the System making a good faith effort to help out the state in the face of a real shortfall.

Regent Kaze spoke to his very strongly held belief that litigation should absolutely always be a last resort. For years this Board has been able to avoid litigation sometimes to the chagrin of staff or presidents. Regent Kaze stated he believed there is always a compromise position. He believed the Board of Regents must act for the good of education and never for political reasons. At the same time the Regents must

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be good citizens of the State of Montana, as an institution known as the Board of Regents and also as individual people. It serves no one well for the Board of Regents to say not just "no", but "hell no", and have no ability later to contribute to a shortfall in revenue that may in fact occur in the state. He did believe, as stated by Regent Topel, that it is far too early to determine that 8% is the correct amount. Yet he stated he had enough fear in his heart that the percentage is correct that the System must be prepared to move forward, as stated earlier by the Commissioner.

Regent Kaze stated he wanted to be certain the commitment to quality effort is in no way lost sight of; that should be foremost in the minds of the Regents because the obligation to provide quality education to Montana's citizens cannot be abrogated. If the Board of Regents did not believe that quality could be maintained on the budget provided by the Legislature, how could it be possible with less?

Regent Kaze then asked whose option is it that a legal action be instigated. If the Board does not comply with the call back, does the Governor have legal authority to commence an action, or does that authority already exist with regard to the System's budget and the Board then must commence an action to prevent a call back from occurring?

Chief Counsel Schramm responded that has been discussed by staff at some length. No real resolution was reached. If the Regents decided to stand firm and not participate in a rescission and indicated willingness to defend that stand through litigation, what happens then? It is not clear. If the Governor continues to seek an 8% call back (approximately 1/12th of the System's budget), if the Governor took some action at this time unknown to remove the Regents' budget authority, expenditures could perhaps continue to occur

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until May or June. If neither side wanted to take the initiative that might occur. That is, of course, completely unacceptable because the System would have to totally shut down in June while the matter was resolved. Dr. Schramm stated he believed that if the Board chose litigation as one of the options, and was willing to go that route if a cut back is demanded, now is probably not the proper time. He did not view the August 12 memorandum as other than something akin to a planning document, a statement of intent that the Governor intends to announce a definite plan perhaps around September 6. If the Regents take a position to litigate, and let that position be known, then in some sense the ball is in the Governor's court not only in how he responds to the System, but to the other state departments as well. There are many variables for planning in the Executive Branch. It would probably be cleanest if the System awaits some directive from the Executive Branch that a decision has been made and that the System's share is "x%". Going to court before that occurs appeared to Dr. Schramm to be precipitous.

Regent Kaze asked Dr. Schramm if he had any sense of how timely the District Court or Supreme Court might address these issues? Dr. Schramm responded it appeared that action is quicker the Helena courts than in most other large cities in the State. The judges in Helena have been very willing to expedite matters when a case could be made that delay was inconvenient. If litigation was begun in mid-September, Dr. Schramm stated he would not be surprised to see it through the District Court by mid-December.

Regent Kaze noted in many lawsuits, by the time the issue is decided, the issue may be moot.

Regent Schwanke expressed his thoughts. He believed the Governor was premature in his assessments and judgments,

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placing the Board of Regents in a nearly impossible position if, as has been presented, 85% - 90% of the System's budgets are already committed. He agreed with Regent Kaze that litigation should be viewed as a very last resort in resolution of problems. As the Commissioner said, however, the Board has few alternatives. He would be willing to make a commitment to litigate. The commitment of the Board of Regents is to the students, parents of those students, and taxpayers of the State of Montana. That commitment is that the Board will provide the best quality education it can for those constituent groups. For that reason alone he would endorse the direction in which the Board appears to be headed.

Regent Johnson stated he was thinking pretty much along the same lines as Regent Schwanke. He also agreed with Regent Kaze that litigation should be a last resort. The Board of Regents has an obligation to try to cooperate and negotiate. From the statements made by all the presidents and directors in today's meeting that even if there was agreement with the approach taken by the Governor it would not be possible to return 8% of the System's general fund appropriation because of commitments already made. If the majority of any call back must be made from the second year of the biennium, he agreed it was premature to try to decide what that amount would be.

Regent Johnson then stated that regardless of personal feelings that litigation is indeed a last resort, this Board would be derelict in its duty to not file a lawsuit on this issue if it believes there are solid legal arguments in support of its position. To go along with the Governor and then find he had no legal authority to do what he did would be a disastrous mistake. Litigation should be considered as a possibility, but only as a last resort.

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Regent Boylan spoke to his years of legislative experience, and his recognition that there are other matters to be considered in state government. The smaller the budget the greater the impact of a percentage call back on that individual budget. All of state government is impacted by this action of the Governor. The System must think of the welfare of the rest of state government which might be more seriously affected than the System is through this action. The University System is a major draw down on the general fund; the Board of Regents must be very thoughtful in its deliberations and weigh matters carefully. The budget does have to be balanced; revenue estimates fluctuate dramatically. Who is right? The Governor's budget office? The Legislative Fiscal Analyst? There is only so much money in the pot; the System should not drain more from the pot that it has to. Planning for a major or minor disaster should occur.

Student Regent Rebish stated her belief that a "toe-to-toe confrontation" with the Governor is not the answer. That might cause even more resentment, with more drastic effects. An 8% cutback would devastate any of the units; any kind of tuition increase would be difficult for the average student. Many students work, and they pay taxes. A surcharge on top of the anticipated tuition is a double blow.

Regent Topel clarified that he was operating under the assumption that questions of legal action are a last resort. The Board of Regents should and will continue to try to have dialogue with the Governor's office to attempt to reach some sort of compromise. If no compromise is possible, and the System is faced with an 8% call back, that is the time to pursue legal action.

Dr. Schramm concurred with that analysis, emphasizing what he said earlier that even if authorization was

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given to go down that particular track, there would be no lawsuit until something definite was received ordering the System to rescind a definite amount.

Dr. Schramm then read a suggested resolution for consideration by the Regents which would provide a course of action in the event of certain triggers, or tracks. The resolution directed the Commissioner to: (A) take the steps necessary to determine if the laws of Montana require the Regents to revert previously appropriated funds upon the direction of the Governor; (B) explore the feasibility of complying with budget cuts directed by the Governor so that in the event litigation results in a final decision adverse to the Regents, compliance can be attempted in the fashion least destructive to the integrity of the Montana Higher Education System; and (C) concurrently explore the feasibility of making a good faith effort to share in solving any verified general fund deficit regardless of the results of any litigation undertaken by the Board.

Discussion of the Proposed Resolution by the Board

A. (Direct the Commissioner to:) Take the steps necessary to determine if the laws of Montana require the Regents to revert previously appropriated funds upon the direction of the Governor.

Regent Kaze expressed discomfort with the proposed language, stating it sounds as if that action will be taken tomorrow.

Dr. Hutchinson noted his interpretation would be that there will continue to be dialogue between his office and the Governor's budget office. Every effort would be made to reach an agreement satisfactory to both agencies. If a directive is received from the Governor with a firm amount of call back indicated that can not be made without devastating

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the University System, that would indicate a breakdown in efforts to try to work with the Governor. The point of last resort the three attorneys have cautioned about would have been reached. And at that point legal action would be taken.

Regent Kaze spoke to his understanding of what has occurred in this meeting. He has heard that the decision has been made today that the Board of Regents will sue the Governor to determine whether the laws of Montana require the Regents to revert previously appropriated funds upon his direction. When someone else determines there has been a breakdown in communication, then the action will go forward. Personally Regent Kaze stated he would like to be involved in helping make the decision that communications really have broken down. If the Governor should determine the budget shortfall is substantially less than he had estimated, then Regent Kaze might not think litigation was the resort; at least he would be subject to listening to an argument.

Commissioner Hutchinson suggested amendatory language in that clause stating "upon final approval of the Board of Regents" or "final direction from the Board of Regents." He stated he personally had no problem with such language, nor did he think it was the intent of anyone to launch any action over which the Board would have no control. It would be entirely appropriate for the Board to come back into session after a formal directive has been received from the Governor, review the efforts at negotiation, and determine if impasse has been reached

Regent Johnson stated his concurrence with that directive, noting that if all efforts at negotiation fail the Regents will have to consider the possibility of a lawsuit.

Regent Kaze reiterated his dislike of the last alternative, adding personally he was just not ready to make that decision.

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Chief Counsel Schramm noted he shared Regent Kaze's feelings to a large degree. Having served as Chief Counsel for the System for ten years, this is only the second time that he has recommended to the Board that they should positively consider litigation. It is not an action to be entered into lightly. There was no attempt here to rush to litigation. But it is also important to remember that the discussion is about the distribution of scarce resources. As Regent Boylan stated, there are a lot of demands on those scarce resources. At the conclusion of this meeting the budget office and the other players in this political drama should have no mistaken impression about the Board's willingness to stand up for its rights. Dr. Schramm added that kind of stand in the long run may very well mitigate the possibility of litigation. While certainly the Board does not need to grant carte blanche authorization to go to litigation, it should not appear indecisive either.

Regent Topel stated he viewed the decision to go to litigation in a similar manner to the decision made to downsize the System. The decision to downsize was made last Spring. As far as he is concerned that is done; all that needs to be done now is determine how best to accomplish downsizing. He agreed with Dr. Schramm that action needs to be taken today that makes it clear the Board of Regents is prepared to determine once and for all who has what authority if an agreement can not be reached that is agreeable, reasonable, and palatable to all. The Board is making the decision to litigate. He wished it to be made clear that decision is not going to be revisited. The only issue that will be revisited is that of whether impasse has been reached and if it is apparent that we can go no further.

Regent Kaze stated he agreed.

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Chairman Mathers called for any other discussion.

Deputy Commissioner Noble spoke to a procedural point regarding approval of the operating budgets as submitted to the Commissioner's Office. The campuses have spent several months preparing those budgets. Mr. Noble stated he believed the System must proceed on the basis of the amounts appropriated. The September meeting of the Board is scheduled and by the appropriation act the Regents have to approve an operating budget prior to October 1. There isn't sufficient time to prepare operating budgets for approval of less than the amounts appropriated

However, from the direction of the actions and discussion today a plan does have to be made to prepare to put back 8% per year of the biennium if the results are not those that the System would wish. That will take several months of planning. Mr. Noble stated that by December 1991 options and plans should be in place for that eventuality. If tuition surcharges are to be imposed to make up a portion of any call back, those would have to be in place by January 1992. Mr. Noble suggested there should be two plans in place by December; one certainly would have to provide for return of the full 8% call back if the Governor does not change that amount, and if it the authority to make that call back is determined to reside with the Governor. The second plan should present ways to lessen the impact the first year of the biennium, and shift the majority of the call back to the second year of the biennium.

Mr. Noble referenced his report made earlier in the meeting which explained the call back applies against contractual payments against which the targets will have to be reset even at the 8%. Decisions must be made on how those targets will be reset, and who will pay how much of the bottom line on the 8% recall. There are many decisions which will

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have to be made to begin planning for all eventualities. Mr. Noble suggested commencing discussions with the Budget Committee in the immediate future to begin putting plans in place.

Discussion was held briefly on how this process differs from that in place for the commitment to quality effort. The Commissioner explained the various differences, most notably that the commitment to quality effort assumed the current budgets would stay in place; there would be some growth in the years to come; and there would be no reduction in the base. Planning for the 8% call back would contemplate a substantial base budget reduction.

At the Chairman's request, presidents commented on the discussion.

President Dennison spoke to his understanding of the process anticipated in the commitment to quality effort. That process would be to use existing budgets in ways to sustain or enhance the quality of the education provided. But to meet this recession would mean we would be removing dollars, at the same time talking about limiting enrollments which further reduces the dollars provided, so it is a very different process. It is no longer making certain the System uses its existing dollars in the best possible way. Instead, some of those dollars will be taken away. That will have a detrimental effect on quality. Some of the techniques might be similar, but it is qualitatively a different process. Very different.

The other comment President Dennison wished to make was to agree with Regent Topel. That the significant issue here is to make a determination that the legal issue needs to be resolved. That does not say the System will not participate in a revenue shortfall. It is important for higher education to indicate it will be forthcoming in the event of need.

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President Dennison concurred that the legal issue is a significant one given the responsibilities of this Board.

President Malone, MSU, agreed. He stated many of the same outcomes occur with this as with the commitment to quality effort. The key for MSU is static funding over the horizon. If funding is not static, then everything deteriorates fairly rapidly.

President Daehling concurred with President Dennison's remarks about the results, but the differing objectives. Units would be forced, under the call back, to cut expenditures without a focus on quality. The commitment to quality effort was intended to focus on quality with the same level of funding. The legal issue needs to be resolved.

Chairman Mathers called on Representative Peck for comment. Representative Peck noted he was not present for the purposes of making a statement. He stated the thing that has been turning around in his mind ever since Mr. Schramm gave him a copy of his legal memorandum and he heard the presentation on it is that if the Regents take the position that they are going to go to court, and the Governor thinks that through, he might conclude he has a problem that really isn't really his problem. That statute passed last time was passed by the legislature - and the legislature is empowered with the appropriations process. The Governor might just decide to call the Legislature back in and tell them to clean it up. Representative Peck questioned if the Regents really want the Legislature called back into session because the System doesn't want to deal with the Governor on the call back issue and have decided to challenge him. His conclusion would be that they would not.

Chairman Mathers stated he did not believe that is what the Regents are saying. He believed the Regents are

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saying they are willing to work with the Governor and with the budget office and make as great an effort possible recognizing that effort will be very minimal in the first year of the biennium. But all agree that if that revenue shortfall that's anticipated does come to pass, then the System will adjust its budgeting programs in such a manner that it will share on equal footing with all other state agencies.

Representative Peck suggested he was just setting a scenario of the Regents forcing the legislature back into session. That may be the action that would occur if the hard position is taken that litigation will occur if the System does not find agreement with the Governor. He spoke briefly also to the possibility of the Legislature proposing a Constitutional amendment to redefine the issue of who has ultimate responsibility to manage the University System.

Dr. Schramm then read into the record the following reworded resolution which he believed contained the amendatory language suggested in the above discussion:

The Board of Regents, fully cognizant that it is vested with the Constitutional responsibility both to govern the Montana University System and to maintain the educational integrity of the System, hereby directs the Commissioner of Higher Education to:

A. Make all efforts to reach accommodation with the Governor's office over the budget rescission issue.

B. With the concurrence of the Board, initiate steps necessary to determine whether the laws of Montana require the Regents to revert previously appropriated funds upon the direction of the Governor.

C. Explore the possibility of complying with budget cuts directed by the Governor so that in the event litigation results in a final decision adverse to the Regents, compliance can be attempted in the fashion least destructive to the integrity of Montana higher education.

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D. Concurrently explore the feasibility of making a good faith effort to share in solving any verified general fund deficit regardless of the results of any litigation undertaken by the Board.

Regent Johnson questioned if there should be something inserted between "A" and "B" that clearly stated if satisfactory resolution is reached in "A", the Regents will not proceed to litigation. Dr. Schramm responded he believed that to be implicit in the concurrence because "failed" will be a subjective term. Regent Topel noted also there will be no concurrence to the action proposed in "B" if satisfaction is reached on the terms of "A". "B" requires an affirmative vote by this Board in order to file that action.

Chairman Mathers asked if that was clear to all members of the Board, and was assured it was.

MOTION: Hearing no further discussion, Regent Kaze moved the above resolution be approved. The motion carried unanimously.

There being no further business to come before the Board, the Chairman declared the meeting adjourned at 4:15 p.m. The next regularly scheduled meeting of the Board of Regents will be held September 19-20, 1991, in Helena, Montana.