



Montana Legislative Services Division

Office of the Code Commissioner

April 28, 2005

Krista Y. Lee Evans
Room 171
State Capitol Building
Helena, Montana 59620

Dear Ms. Evans:

I am writing in response to your request for an analysis of section 15 of House Bill No. 22, enacted as Chapter 288, Laws of 2005. Section 15, Chapter 288, Laws of 2005, provides:

Contingent voidness. If at least \$2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in [section 7], for the purposes of funding Montana's water adjudication program, then [this act] is void.

This language is fairly straightforward and the meaning is plain to a person who is familiar with the legislative appropriation process and means an appropriation of funds made by the Legislature for a specific purpose. The purpose could be limited to a specific item, such as equipment, or more generally to a category of expenditure or a program. This type of condition in legislation is not unique to House Bill No. 22. Similar language was included in section 9 of House Bill No. 435 establishing the Governor's postsecondary scholarship program. The rules of statutory construction require the language of a statute to be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is required. The Supreme Court will resort to legislative history only if legislative intent cannot be determined from the plain wording of the statute. Lovell v. State Compensation Mutual Insurance Fund, 260 Mont. 279, 860 P.2d 95 (1993). However, because of the magnitude of the issue I will elucidate.

The Montana Supreme Court discussed the term "appropriation" in State ex rel. Haynes v. District Court, 106 Mont. 470, 78 P.2d 937 (1938). The Court stated:

This court has had occasion to discuss and define the term "appropriation" as used in our Constitution and statutes. In the case of State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841, 845, the court said: "'Appropriation' means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state." In the case of State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 Pac. (2d) 227, 229, this court said: "The meaning of the term 'appropriation,' together with the manner of making the same, was the subject of discussion in State ex rel. Toomey v. Board of Examiners, supra [74 Mont. 1, 238 Pac. 316], wherein the court said: 'The word "appropriation" is defined by Webster as "the

act of setting apart or assigning to a particular use or person; * * * the application to a special use or purpose, * * * as of money to carry out some public object," which definition has received the sanction of this court. (State ex rel. Rotwitt v. Hickman, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403.) This setting apart or designation of the purpose for which public money may be used must be "made by law." This provision, however, does not require the introduction in the legislature of an appropriation bill, but the act may be accomplished in any manner receiving the sanction of the law." Haynes at 476-477.

Based upon this cogent analysis, an appropriation is authority, derived from the Legislature, for a governmental entity to expend money from the state treasury for a specified public purpose.

An "item" of appropriation is referenced in Article VI, section 10(5), of the Montana Constitution, authorizing the Governor to veto "items" in appropriation bills. That provision was also contained in Article VII, section 13, of the 1889 Montana Constitution. In explaining the 1972 constitutional provision, Delegate Joyce stated:

This section preserves the current line-item veto that's in the Montana Constitution, the idea being that general appropriations bills go through with more than one item in there. There may be a hundred different appropriations. He doesn't have to veto the entire appropriation bill if he is displeased with only one item. He can veto that one item. And when he does so, the procedure on this is the same as on any other bill that he vetoes. It requires the two-thirds vote to override him. Verbatim Transcript, Montana Constitutional Convention, Volume IV, page 956.

The 1889 constitutional provision was interpreted in Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924). In that case the Montana Supreme Court held that under Article VII, section 13, of the 1889 Montana Constitution, that empowered the Governor "to disapprove of any item or items of any bill making appropriations of money, embracing distinct items", the Governor could not scale any particular item or items by deducting a certain percent of the amount appropriated by the Legislature in a bill which because of adjournment could not be returned to it for further action. By doing so the Governor would be exercising creative legislative power and usurping the function of the Legislative Assembly.

The 1972 constitutional provision was construed in Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975). In that case, the Montana Supreme Court held that Article X, section 9, of the Montana Constitution, when construed with Article III, section 1, Article V, section 1, and Article VIII, section 12, of the Montana Constitution, justifies legislative power to appropriate and exercise control over expenditures through itemization. However, appropriation certification over private money and appropriation conditions limiting college president salaries were unconstitutional infringements on the management authority of the Board of Regents.

The current constitutional provision is implemented by section 5-4-303, MCA. Section 5-4-305, MCA, also discusses when "items" of an appropriation become law when the bill in which the "items" are contained is returned by the Governor to the Legislature without the Governor's signature and with objections to one or more items in a bill containing several items of appropriation of money.

Section 17-7-140, MCA, concerning reductions in spending ordered by the Governor during a shortfall in revenue, authorizes the Legislature to exempt from a reduction an appropriation item within a program or to direct that the appropriation item may not be reduced by more than 10%.

All of the cited material supports the plain meaning of a "line item appropriation" as an appropriation of funds made by the Legislature for a specific purpose. I have examined the pertinent provisions of House Bill No. 2, the general appropriations act, in some detail and have made various inquiries relating to the language contained in section 15 of House Bill No. 22, but I have been unable to identify a line item appropriation of at least \$2 million for each fiscal year from state sources other than the water adjudication account, for the purposes of funding Montana's water adjudication program. Within the appropriations made to the Department of Natural Resources and Conservation are line items of \$400,000 in fiscal year 2006 for the water adjudication database, \$600,000 in fiscal year 2006 and \$1 million in fiscal year 2007 to expedite water adjudication, and \$690,337 in fiscal year 2006 and \$691,421 in fiscal year 2007 to the Reserved Water Rights Compact Commission. I have been urged to add these items together in order to avoid the contingent voidness contained in section 15 of House Bill No. 22. That interpretation would, of necessity, be result-orientated and would fly in the face of the plain meaning of section 15 of House Bill No. 22.

While I am aware that section 1-2-105(3), MCA, provides that the singular includes the plural and the plural the singular, there are other definitions that preclude adding the various line items in House Bill No. 2 to achieve a predetermined result. Section 15 of House Bill No. 22 also requires that the line item appropriation be for the purposes of funding Montana's water adjudication program. Section 5 of House Bill No. 2 provides that as used in House Bill No. 2, "program" has the same meaning as defined in section 17-7-102, MCA, is consistent with the management and accountability structure established on the statewide accounting, budgeting, and human resource system, and is identified as a major subdivision of an agency ordinarily numbered with an arabic numeral. Section 17-7-102, MCA, defines "program" as a principal organizational or budgetary unit within an agency. Section 2-15-212, MCA, which establishes the Reserved Water Rights Compact Commission, provides that the Commission is attached to the Department of Natural Resources and Conservation for administrative purposes only, as prescribed in section 2-15-121, MCA. Section 2-15-121, MCA, provides that an agency allocated to a department for administrative purposes shall exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department. The department to which an agency is allocated for administrative purposes only in shall direct and supervise the budgeting, recordkeeping, reporting, and related administrative and clerical functions of the agency, include the agency's budgetary requests in the departmental budget, and collect all revenue for the agency and deposit

them in the proper fund or account. The department may not use or divert the revenue from the fund or account for purposes other than provided by law.

Based upon section 2-15-121, MCA, it is impossible for the Reserved Water Rights Compact Commission to be a principal organizational or budgetary unit within the Department of Natural Resources and Conservation, and therefore the Commission cannot be considered to be the same "program" as the other item appropriations discussed earlier. The duty of the Supreme Court in interpreting a statute is not to enact but to expound the law, to apply the law as it finds it, and to maintain its integrity as it is written. It may not insert what has been omitted or omit what has been inserted. State ex rel. King v. Smith, 98 Mont. 171, 38 P.2d 274 (1934). In construing a statute the Supreme Court will not read into it words necessary to make it conform to a supposed intention of the Legislature; its intention in enacting it must be gathered from the language employed therein, not from street rumors or other similar sources. Mills v. State Board of Equalization, 97 Mont. 13, 33 P.2d 563 (1934). In order to "save" House Bill No. 22, it is my opinion that these principles would be violated. In conclusion, at least \$2 million is not appropriated in a line item for each fiscal year from state sources other than the water adjudication account provided for in section 7 of House Bill No. 22 for the purposes of funding Montana's water adjudication program. Therefore, by its own terms, House Bill No. 22 is void.

On a related matter, there are other bills that are contingent upon House Bill No. 22 being "passed and approved". Section 1-2-201(2), MCA, defines "passage", as used in "passage and approval", as the enactment into law of a bill, which has passed the Legislature, either with or without the approval of the Governor, as provided in the Constitution. Article VI, section 10(1), of the Montana Constitution provides that each bill passed by the Legislature, except bills proposing amendments to the Montana Constitution, bills ratifying proposed amendments to the United States Constitution, resolutions, and initiative and referendum measures, must be submitted to the Governor for the Governor's signature. If the Governor does not sign or veto the bill within 10 days after its delivery, the bill becomes law.

In Palatine Insurance Company v. Northern Pacific Railway, 34 Mont. 268, 85 P. 1032 (1906), the Montana Supreme Court stated that the journal of either house of the Legislature imports verity and may be looked to in order to determine whether or not a bill, valid on its face, signed by the presiding officer of each house, approved by the Governor, and deposited in the office of the Secretary of State was in fact passed in compliance with the requirements of Article V, section 24, of the 1889 Montana Constitution. A law (now repealed) relating to the establishment of county free high schools provided that it "shall take effect and be in full force from and after its passage and approval by the Governor". The bill was never expressly approved by the Governor but became a law pursuant to Article VII, section 12, of the 1889 Montana Constitution. The provision that if any bill was not returned by the Governor within 5 days after presentment to the Governor, it became a law, in the same manner as if the Governor had signed it, was binding upon the Legislature, and the act in question became a law notwithstanding the "passage and approval" provision contained in the bill. Evers v. Hudson, 36 Mont. 135, 92 P. 462 (1907). Because the Governor in the approval of laws is a component part of the Legislature and a bill can become a law (with certain exceptions) without the Governor's approval, the

Governor's approval fixes the time when the bill becomes a law. State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, 238 P. 316 (1925). It was a fatal defect for the Legislature to ignore the Governor, in neglecting and refusing to present proposed constitutional amendments to the Governor in full as passed by the House and Senate for the Governor's approval or disapproval. State ex rel. Livingstone v. Murray, 137 Mont. 557, 354 P.2d 552 (1960).

House Bill No. 22 was passed by the Legislature on April 11, 2005, and was signed by the Speaker of the House and the President of the Senate on April 14, 2005. The bill was approved (signed) by the Governor on April 20, 2005, and the Secretary of State designated House Bill No. 22, as Chapter 288, Laws of 2005, on that same day. Therefore, House Bill No. 22 was "passed and approved". Any legislation tied to the "passage and approval" of House Bill No. 22 is valid and remains in full force and effect.

I hope that I have adequately addressed your questions. If you have additional questions, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Code Commissioner