



Montana Legislative Services Division
Legal Services Office

March 24, 2010

Senator Dan McGee
1925 Pinyon Drive
Laurel, Montana 59044

Dear Senator McGee:

I am writing in response to your request for an opinion as to the authority of the Governor to withhold funds appropriated for dispersal to local governments and funds appropriated for historic preservation purposes in House Bill No. 645. House Bill No. 645 was enacted as Chapter 489, Laws of 2009. Section 57, Chapter 489, Laws of 2009, prescribed the allocation and distribution of funds appropriated in section 85, Chapter 489, Laws of 2009, to the Department of Commerce for local governments. Counties are to receive \$10 million of the appropriated amount, and cities and towns are to receive \$10 million of the appropriated amount. The funds are required to be distributed pursuant to Title 90, chapter 1, part 2, MCA, the Big Sky Economic Development Program. Each county must receive \$100,000 plus the proportional share of the funds remaining from the \$10 million based upon a blending of the distribution formulas contained in section 15-70-101(2)(b) and (3), MCA. Each city and town must receive \$5,000 plus a proportional share of the funds remaining from the \$10 million. The proportional share is calculated by allocating 50% of the remaining funds to each city and town based upon the distribution formula in section 15-70-101(2)(c), MCA, and 50% of the remaining funds to each city and town based upon the percentage that the population of each city or town bears to the total population of all cities and towns.

Section 57(2)(a), Chapter 489, Laws of 2009, approved specific projects for each county and section 57(2)(b) approved specific projects for each city and town. Section 57(2)(c), Chapter 489, Laws of 2009, authorized the Department of Commerce to approve projects for: (1) designing, erecting, repairing, and remodeling public buildings or making energy efficiency improvements to public buildings; (2) designing, constructing, and repairing sewers, storm sewers, sewage treatment and disposal plants, waterworks, and reservoirs; (3) designing, constructing, and repairing bridges, docks, wharves, breakwaters, and piers; (4) designing, constructing, reconstructing, improving, maintaining, and repairing roads; (5) acquiring, opening, or widening any street and improving the street by designing, constructing, reconstructing, and repairing pavement, gutters, sidewalks, curbs, and vehicle parking strips; (6) designing, building, renovating, and equipping parks and other recreation facilities; and (7) installing street lighting.

Section 57(3), Chapter 489, Laws of 2009, provides that the governing body of a county, city, or town may choose to propose to the Department of Commerce an alternate project to those listed in section 57(2)(a) and (2)(b) based on the criteria in section 57(2)(c). If the alternate project meets the criteria in section 57(2)(c), the Department is required to approve the project. A recipient of funds under section 57, Chapter 489, Laws of 2009, must expend the funds by

September 30, 2010. Unexpended funds are required to revert to the state and are required to be deposited in the state general fund. The Department of Commerce is required to disburse the funds to recipients as quickly as possible.

Section 42, Chapter 489, Laws of 2009, amended section 90-1-204, MCA, to exempt the funds appropriated in Chapter 489, Laws of 2009, from specified requirements for the receipt of funds under the Big Sky Economic Development Program. Information provided to the Education and Local Government Interim Committee indicated that 12 counties and the Anaconda-Deer Lodge consolidated government had not received the funds allocated to them under section 57, Chapter 489, Laws of 2009. In addition, 37 cities and towns had not received the funds allocated to them under that section. The total of the retained funds was \$3,544,061.

If a county, city, or town has submitted a proper application for the funds or has not been notified that its application was deficient, there does not appear to be any legal basis for withholding the funds. The only possible basis for not disbursing the funds is contained in section 17-7-140, MCA. That section authorizes the Governor to order a reduction in spending in the event of a projected general fund deficit. As you are aware, the Budget Director has certified a projected general fund deficit to the Governor, has made his recommendations for reductions in spending, and has received the recommendations of the Legislative Finance Committee. However, reductions in spending have not been ordered. A reduction in spending for the money under discussion was not included in the Budget Director's recommendations and therefore was not reviewed by the Legislative Fiscal Analyst or the Legislative Finance Committee. A reduction in spending for the Big Sky Economic Development Program could result in a breach of contract for local governments that have already received their allocated funds. The contracts with those local governments had a provision for 10% of the grant to be paid to the local government upon project completion and receipt of all required reports and the local government's request for the final payment.

Under the provisions of section 57, Chapter 489, Laws of 2009, the only functions of the Department of Commerce are to determine if an alternative project meets statutory guidelines and to determine if an application for funds is correct and complete. If the Department of Commerce has received correct and complete applications for funds from the local governments that have not received their allocation, then the Department is not in compliance with the requirement in section 57(5), Chapter 489, Laws of 2009, that it disburse the funds as quickly as possible. Because there is no statutory basis for withholding funds if the local governments have submitted correct and complete applications, then withholding the funds appears to be an arbitrary and capricious action and an abuse of discretion by the Department that is unconstitutionally violative of substantive due process under Article II, section 17, of the Montana Constitution. See Westside Neighborhood Betterment Committee v. Great Falls, 242 Mont. 58, 788 P.2d 335 (1990). An action is arbitrary and capricious if there is an absence of a rational connection between the facts found and the choice made. Natural Resources Defense Council v. United States Environmental Protection Agency, 966 F.2d 1292 (9th Cir. 1992). There does not appear to be any rational basis for granting funds to some local governments that have submitted correct and complete applications and withholding funds from other local

governments that have submitted correct and complete applications. In addition, certain statements reported in the news media appear to exacerbate the Department's problem in defending against an allegation that its action with regard to the local government grants is arbitrary and capricious.

An additional problem related to the delay in disbursing funds is created by the statutory requirement that funds be expended by the local government by September 30, 2010, or they revert to the state general fund. By withholding funds to a local government that has submitted a correct and complete application for an eligible project, the Department may be causing local governments to fail to meet the statutory deadline. The Department could be found to have anticipatorily breached the contract required by the Department that references the statutory timeframe and to have acted in bad faith, thus subjecting itself to liability for damages.

The analysis related to the Department's failure to award grants for historic preservation is different from the failure to award grants to local governments. Section 85, Chapter 489, Laws of 2009, contains a \$2 million appropriation from the state general fund to the Department of Commerce for historic preservation competitive grants for each year of the biennium. The language accompanying the appropriation on page A-4 of section 85 provides:

The item for Historic Preservation Competitive Grants is for the awarding of grants to public or private entities for the preservation of historic sites within the state of Montana based on a competitive criteria created by the department, as guided by the legislature, that may include:

- (1) the degree of economic stimulus or economic activity, including job creation and work creation for Montana contractors and service workers;
- (2) the timing of the project, including the access to matching funds if needed and approval of permits so the work can be completed without delay;
- (3) the historic or heritage value related to the state of Montana;
- (4) the successful track record or experience of the organization directing the project; and
- (5) the expected ongoing economic benefit to the state as a result of the project completion.

The amount of \$50,000 of the line item for Historic Preservation Competitive Grants must be used for the restoration and preservation of the historic Daly mansion.

The amount of \$40,000 of the line item for Historic Preservation Competitive Grants must be allocated to the historic St. Mary's mission maintenance and restoration project.

The amount of \$180,000 of the line item for Historic Preservation Competitive Grants must be used for the restoration and preservation of the travelers' rest historic site.

The amount of 2.71 % of the appropriation for the line item for Historic Preservation Competitive Grants may be used for administrative expenses to implement the program.

The three specified grants for specifically mentioned projects have been awarded. The Department has indicated that it received 135 applications for the discretionary funds but has not scored or ranked the applications. There are no statutory directions to disburse the historic preservation grant funds as quickly as possible. There is no statutory timeframe for the expenditure of the historic preservation grant funds after receipt by the grant recipient. The only time restriction on the distribution of the funds is the end of the fiscal year on June 30 of the year for which each \$2 million appropriation is made. However, the introductory language of section 85, Chapter 489, Laws of 2009, allows appropriations to be transferred among fiscal years, so the time restriction on the distribution of the historic preservation grant funds is June 30, 2011. If the grant funds are not encumbered by the end of the last fiscal year, then, pursuant to sections 17-7-302 and 17-7-304(1), MCA, the funds revert to the state general fund. The only real issue concerning the award of the historic preservation grant funds at this point in time is why the Department was able to disburse the funds in the specified amounts for the three specifically named projects but has not acted similarly with respect to the specifically named projects in the specified amounts for local governments when those local government grants are required to be made as quickly as possible.

I hope that I have adequately addressed your questions. If you have other questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

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