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Dear Ms. Carlson:

I am writing in order to provide you with comments on the January 8, 2010, letter from the Office of Budget and Program Planning (OBPP), which directed agencies to submit budget reduction proposals pursuant to section 17-7-140(1)(b), MCA. Additionally, this memorandum addresses some questions raised by the Legislative Fiscal Division (LFD) relating to budgeting and appropriation statutes. I fully anticipate that more questions will arise, and I look forward to providing supplemental responses.

Based on my review of the OBPP letter, I see three main issues, all of which assume that the budget director will certify a "projected general fund budget deficit". *See* section 17-7-140(4), MCA. The issues are as follows:

(1) How is the 10% reduction in spending limit applied, and what is considered a program inside an agency?

(2) Are programs subject to a reduction in spending if funding derives from a statutory appropriation, a nongeneral fund appropriation, a language appropriation, or a "nonbudgeted" transfer?

(3) What should the Legislature consider in the next session?

A background of section 17-7-140, MCA, is provided below, and the above issues are addressed in the order in which they are listed.

1. THE POSITIVE ENDING FUND BALANCE REQUIREMENT AND THE BACKGROUND OF SECTION 17-7-140, MCA

Article VIII, section 9, of the Montana Constitution requires only a good faith attempt on the part of the Legislature to contain appropriations within anticipated revenue, which includes the balance in accounts that are subject to appropriation. However, the 2003 Legislature enacted Senate Bill No. 483 as Chapter 607, Laws of 2003. That legislation amended section 17-7-131, MCA, to require the legislatively adopted budget to be

limited so that a positive ending general fund balance exists at the end of the biennium for which funds are appropriated.

That legislation has implications for the application of section 17-7-140, MCA. The section provides that in the event of a projected general fund budget deficit, the Governor, taking into account certain enumerated criteria, shall direct agencies to reduce spending in an amount that ensures that the projected ending general fund balance for the biennium will be at least 1% of all general fund appropriations during the biennium. An agency may not be required to reduce general fund spending for any program, as defined in each general appropriations act, by more than 10% during a biennium. Departments or agencies headed by elected officials or the Board of Regents may not be required to reduce general fund spending by a percentage greater than the percentage of general fund spending reductions required for the total of all other Executive Branch agencies. The Legislature may exempt from a reduction an appropriation item within a program or may direct that the appropriation item may not be reduced by more than 10%. Pursuant to section 17-7-140(2), MCA, the Governor may not order reductions in spending for:

(a) the payment of interest and principal on state debt;
(b) the Legislative Branch;
(c) the Judicial Branch;
(d) the school BASE funding program, including special education;
(e) salaries of elected officials during their terms of office; and
(f) the Montana school for the deaf and blind.

Section 17-7-140(3)(a), MCA, defines a "projected general fund budget deficit" as:

> an amount, certified by the budget director to the governor, by which the projected ending general fund balance for the biennium is less than:
>
> (i) 2% of the general fund appropriations for the second fiscal year of the biennium prior to October of the year preceding a legislative session;
>
> (ii) 3/4 of 1% in October of the year preceding a legislative session;
>
> (iii) 1/2 of 1% in January of the year in which a legislative session is convened; and
>
> (iv) 1/4 of 1% in March of the year in which a legislative session is convened.

Section 17-7-140, MCA, was enacted by Chapter 787, Laws of 1991. As initially enacted, the Governor had the authority to reduce individual appropriations during a shortfall, with certain enumerated exceptions. During the July 1992 Special Session, section 17-7-140, MCA, was amended by Chapter 5, Special Laws of July 1992, to provide for reductions in spending (as opposed to reductions in appropriations) in response to *Nicholson v. Stephens*, Cause No. BDV-91-1864 (1st Judicial District, 1991).

In *Nicholson*, Judge Sherlock held section 17-7-140, MCA, unconstitutional as an unlawful delegation of legislative authority to the Governor in violation of Article III, section 1, of the Montana Constitution, embodying the state separation of powers doctrine. Judge Sherlock cited

State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 477, 543 P.2d 1317, 1321 (1975), for the proposition that the Legislature has the constitutional power of appropriation. *Nicholson*, slip op. at 4. Judge Sherlock also noted that the Legislature must either reduce appropriations or increase revenue in a sufficient amount to realistically meet the appropriations it has set.

I reviewed the minutes from the House Appropriations Committee for July 8 and July 13, 1992, as well as the minutes from the Senate Finance and Claims Committee for July 16, 1992, when amendments to section 17-7-140, MCA, were discussed in light of *Nicholson.* The primary concern with the proposed amendments to the statute came from the Montana University System (MUS), and it was concerned with the ability of the Governor to cut spending. Eventually, amendments changed the amount of mandated reductions on the Board of Regents to the percentage imposed on all Executive Branch agencies.

A small amount of discussion occurred in the Senate Finance and Claims Committee regarding the 10% program cut limit. Senator Jacobson proposed that no agency could be forced to reduce spending by more than 10%. Senator Aklestad proposed that 10% may not give enough latitude to the Governor. Senator Jacobson then stated that effectively it is harder to make cuts greater than 5% because you start "digging deep into the programs and there would be a special session" and that certain amounts cannot be "cut out of a budget no matter how much latitude" is given. Moreover, Senator Jacobson stated that 10% was reasonable because "you have to be able to deal with the agency at the program level." The 10% language was eventually adopted and is contained in the statute today. The legislative history suggests that program level cuts were limited to 10% based on the supposition that a special session is probable when an agency program is cut too far.

The amended version of section 17-7-140, MCA, has not been challenged and is presumed to be constitutional. *See Fallon County v. State*, 231 Mont. 443, 445, 753 P.2d 338, 339 (1988); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 506, 508 (1993). However, section 17-7-140, MCA, was carefully crafted to avoid allowing the Governor to reduce ***appropriations*** and thereby change the law. Article VIII, section 9, of the Montana Constitution clearly places the burden of containing appropriations within anticipated revenue on the Legislature.

2. APPLICATION OF THE 10% REDUCTION IN SPENDING LIMIT ON A PROGRAM-BY-PROGRAM BASIS: NOT ALL PROGRAMS ARE PROGRAMS

Section 17-7-140(1)(a), MCA, provides that an agency "may not be required to reduce general fund spending for any program". As such, the meaning of the word “program” is of the utmost importance. Unfortunately, however, an “agency program” is not always considered a program for purposes of section 17-7-140, MCA. In some situations, multiple agency programs will be considered one program for purposes of that section. Various examples are presented in order to illustrate some of the difficulties involved in analyzing how much of a reduction in spending an agency program may face. The first example shows a situation where multiple agency programs are considered one program for the purposes of section 17-7-140, MCA. *See* item 2.a. The second example shows how a new agency program that is not mentioned in the General

Appropriations Act (HB 2) may be subject to a 10% reduction in general fund spending, subject to the limitations in section 17-7-140, MCA. *See* item 2.b. In the end, a case-by-case analysis may be required in some situations, especially if an agency program receives a general fund appropriation outside of HB 2.

a. Definition of Program and Programs That Meet the Definition

Section 17-7-140(1)(a), MCA, provides that an agency "may not be required to reduce general fund spending for any program, ***as defined in each general appropriations act***, by more than 10% during a biennium". (emphasis added). This sets the stage for a complex analysis of what "programs" are subject to a cut under section 17-7-140, MCA. Essentially, section 17-7-140, MCA, may be applied differently from session to session depending on how the definition of program is written in HB 2.

Section 5 of HB 2 for the 2009 Regular Session provides:

> As used in [this act], "program" has the same meaning as defined in 17-7-102, 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 ordinally numbered with an Arabic numeral.

Given the above, the most important step is to determine if the HB 2 definition of program can be strictly applied to the agency program from which spending cuts are contemplated. The HB 2 definition is composed of three items. First, the statutory definition of program must be used, which states that a program is a "principal organizational or budgetary unit within an agency". Section 17-7-102(11), MCA. Section 17-7-102(2), MCA, in turn, defines an agency as "all offices, departments, boards, commissions, institutions, universities, colleges, and any other person or any other administrative unit of state government that spends or encumbers public money by virtue of an appropriation from the legislature under 17-8-101". Second, the program must be consistent with the management and accountability structure established on the statewide accounting, budgeting, and human resource system (SABHRS). And lastly, an agency entity is not considered a program unless it is identified in the appropriations bill as a major subdivision of an agency ordinally numbered with an Arabic numeral, as opposed to another format such as the alphabet. For example, there are four programs in HB 2 for the Legislative Branch, and they are listed as follows: (1) Legislative Services, (2) Legislative Committees and Activities, (3) Fiscal Analysis and Review, and (4) Audit and Examination. However, if HB 2 lumped all of these programs into one numeric listing, then only one program would exist.[1]

The MUS provides a good example of how the HB 2 definition of program can greatly expand the statutory definition of program so that it captures multiple agency entities. MUS appropriations (in HB 2) are classified by eleven categories using Arabic numerals. The categories are listed as follows: (1) Administration, (2) Student Assistance Program, (3) Improving Teacher Quality, (4) Community College Assistance, (5) Legislative Audit, (6)

[1] This is a simplified example; however, it should be noted that the Legislative Branch is not subject to a mandatory reduction in spending by the Executive Branch. *See* section 17-7-140(2)(b), MCA.

Educational Outreach and Diversity, (7) Workforce Development, (8) Appropriation Distribution Transfers, (9) Tribal College Assistance Program, (10) Guaranteed Student Loan, and (11) Board of Regents. By far, the largest appropriation goes to category eight for appropriations transfers. For fiscal year 2011, category eight received an HB 2 general fund appropriation of $131,637,454. Additionally, there were seven subcategories inside category eight that were alphabetically listed as follows: (a) Legislative Audit, (b) Montana State University-Northern – Biodiesel Research, (c) Agricultural Experiment Station, (d) Extension Service, (e) Forest and Conservation Experiment Station, (f) Montana Bureau of Mines and Geology (MBMG), and (g) Fire Services Training School. For fiscal year 2011, the subcategories in category eight received HB 2 general fund appropriations totaling $21,978,386, with the MBMG receiving $1,931,930. Pursuant to the HB 2 definition of program, everything in category eight is treated as one program. As such, section 17-7-140, MCA, allows a cut of more than 10% from the $1,931,939 that was allocated to the MBMG, so long as all category eight cuts are no more than 10% when added together. This is an example of how a program under the statute is not always a program pursuant to the HB 2 definition of program. *See* section 17-7-102(13), MCA (listing the MBMG as a University System unit). It also shows how "agency programs" are subject to deeper cuts if they do not meet the HB 2 definition of program.

When analyzing an HB 2 appropriation, it is generally safe to assume that a cut of no more than 10% in general fund spending is permissible for programs that meet the strict HB 2 definition of program. However, there may be situations where federal law prohibits a cut, as discussed below. *See* item 3.b. Additionally, it should be noted that a program cut may be prohibited if it impacts services that are integral to the agency's statutory responsibilities. *See* section 17-7-140(1)(b), MCA.

b. Definition of Program in HB 2 Difficult to Apply When a New Program is Established in a "Cat and Dog" Bill or When a Statutory Appropriation Exists

The MUS also provides a good example of how the HB 2 definition of program and the statutory definition of program in section 17-7-102(11), MCA, have conflicting meanings. In calculating program limits, the OBPP determined[2] that all category eight[3] appropriations were lumped into one and the resulting 10% program cap was determined to be $31,017,058. The MBMG did not have a corresponding program cap listed, presumably based on the fact that it is not a program pursuant to the HB 2 definition of program. However, this does not mean that all MBMG general fund spending can be cut more than 10%. This is the case because another MBMG program was funded by way of an appropriation in a "cat and dog" bill.

To illustrate, House Bill No. 52 (HB 52) appropriated $4.2 million of general fund money to the MBMG for the purpose of developing and implementing a Ground Water Investigation (GWI) program. *See* Ch. 436, L. 2009. The GWI program was not listed in HB 2. Moreover, the $4.2 million in funding is listed using an appropriation in section 3 of HB 52 and is not listed using Arabic numerals. However, it is my understanding that the GWI program is listed on SABHRS.

[2]OBPP memorandum entitled MBARS General Fund Reduction Instructions (Jan. 8, 2011).

[3]This was a category 09 appropriation on the OBPP letter due to a difference between the accounting system and the HB 2 listing.

When considering these facts, it becomes readily clear that situations will exist where the statutory definition of program in section 17-7-102(11), MCA, cannot be strictly applied because section 17-7-140, MCA, refers to "any program as defined in the general appropriation act" and the Arabic numbering methodology in HB 2 is not typically used for general fund appropriations in other bills. As applied in this example, the ambiguity creates at least three interpretations. One interpretation is that the GWI program is not subject to a reduction in spending under section 17-7-140, MCA. This argument is premised on the fact that the GWI program does not meet the strict definition of program under the HB 2 definition. Another interpretation is that 10% of the $4.2 million is subject to a cut. However, this interpretation is not supported unless it is determined that the Arabic numbering portion of the HB 2 definition does not apply to appropriations in most cat and dog bills. Lastly, the weakest interpretation is that the GWI program should be lumped into category eight of HB 2, given the fact that money was appropriated to the MBMG for the GWI program. However, this argument defeats Legislative intent to form a new program and would be tantamount to a line item veto outside of the parameters of Article VI, section 10, of the Montana Constitution as implemented by section 5-4-303, MCA.

Clearly, it is difficult to analyze a proposed budget cut when a general fund appropriation is made outside of HB 2, but an exercise in statutory interpretation is helpful. Legislative intent may be determined in a number of ways when a statute is ambiguous. A court presumes the Legislature would not pass a meaningless statute, and the court must harmonize statutes relating to the same subject so as to give each effect. The court can look to the legislative history of the statute. Great deference and respect must be given to interpretation of the statute by persons and agencies charged with its administration. *Mont. Contractors' Ass'n, Inc. v. Dept. of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986), followed in *Albright v. St.*, 281 Mont. 196, 206, 933 P.2d 815, 821-22 (1997); *see also, Winchell v. Dept. of Natural Resources and Conservation*, 1999 MT 11, ¶ 20, 293 Mont. 89, 972 P.2d 1132 (following *Albright*).

As applied in the instant example, if Arabic numbering is an absolute requirement, then section 17-7-140, MCA, which mandates a reduction in general fund spending, becomes somewhat meaningless. Additionally, since statutory appropriations are contained in statute, as opposed to HB 2, they are not listed with Arabic numbers. Does this mean all statutory appropriations from the general fund are exempt from a reduction in spending? As described in more detail below, statutory appropriations from the general fund are not immune from a reduction in spending. *See* item 3.b. Based on a complete reading of section 17-7-140, MCA, the statute addresses reductions in general fund spending across the board, and it was not meant to be constrained to HB 2. *See* item 3.c. The clear purpose of section 17-7-140, MCA, is to allow the Governor to reduce spending in a manner that ensures a positive ending general fund balance. As such, when section 17-7-140, MCA, states that an agency "may not be required to reduce general fund spending for any program, as defined in each general appropriations act, by more than 10% during the biennium", this provisions should be interpreted as a mere limit on the amount by which those "programs" may be required to reduce spending.

When an "agency program" is not covered by the HB 2 definition of program, then the statutory definition of program in section 17-7-102, MCA, can be applied without causing harm to the

stated purpose of section 17-7-140, MCA. That is, ensuring that the projected ending fund balance for the biennium will be at least 1% of all general fund appropriations (including statutory appropriations and cat and dog appropriations) during the biennium. Such an interpretation also follows court precedent of harmonizing statutes relating to the same subject to give each effect. Section 17-7-102, MCA, is a definition section that specifically applies to Title 17, chapter 7, which includes section 17-7-140, MCA. As such, the statutory definition of program most definitely relates to the same subject, and it can be easily applied to section 17-7-140, MCA, which in turn provides a harmonious result.

In conclusion, if a program (as defined in section 17-7-102(11), MCA) is not listed in HB 2, but it receives a general fund appropriation, then it is reasonable to subject the program to a 10% reduction in spending subject to the limitations contained in section 17-7-140, MCA. However, the Arabic numbering requirement is not meaningless for HB 2 general fund appropriations, and it should be followed when a program is listed in HB 2. This finding is bolstered by section 17-8-103(2), MCA, which provides that "[i]n no event does a condition or limitation contained in an appropriation act amend any other statute." Indeed, if the HB 2 definition of program is applied to cat and dog bills and statutory appropriations, then section 17-7-140, MCA, is effectively amended to the point where the stated purpose is defeated.

c. Summary

In summary, the task of determining what qualifies as a program under HB 2 is not always an easy one. When an agency receives a general fund appropriation in HB 2, as opposed to an appropriation in another bill, then the analysis is fairly straightforward. An agency program can meet the statutory definition of program, while at the same time complying with SABHRS accounting and the Arabic numeral listing. As such, when the HB 2 definition of program can be applied, multiple agency programs can be considered one program even if the agency programs are typically considered stand-alone programs. Additionally, if an agency program meets the HB 2 definition of program, then supplemental state general fund appropriations for that program through other bills should be subject to the 10% cap.

The analysis is not as simple when an agency program is not listed in HB 2. When this occurs, a case-by-case analysis may be required. For the most part, if a program (as defined in section 17-7-102(11), MCA) is not listed in HB 2, but it receives a general fund appropriation, then it is reasonable to subject the program to a 10% reduction in spending subject to the limitations contained in section 17-7-140, MCA.

3. CATEGORIES OF APPROPRIATIONS AND REDUCTIONS IN SPENDING BY FUND TYPE

The January 8, 2010, OBPP letter advised that the Governor may direct reductions in any general fund expenditure not exempted by section 17-7-140, MCA, including HB 2, any other appropriation bills (including HB 645), statutory appropriations, or language appropriations. The OBPP letter stated further that reductions may be directed from nongeneral fund appropriations and nonbudgeted transfers when the reduction will increase the general fund balance. An

example was then given using the Coal Tax Shared Account, where the unexpended balance is transferred to the general fund. Advice has been sought on whether the OBPP letter correctly interprets what can be reduced pursuant to section 17-7-140, MCA. In order to answer this question, a legal analysis of appropriation types and fund types is presented, followed by an analysis of the OBPP's position in regard to which funds are subject to a reduction in spending.

a. Appropriations Contained in Law and Fund Types

Article VIII, section 14, of the Montana Constitution, provides:

> Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.

Section 17-7-501, MCA, provides that there are three types of appropriations within the meaning of "appropriation made by law" as used in Article VIII, section 14, of the Montana Constitution: (1) temporary appropriations enacted by the Legislature as part of designated appropriation bills or sections designated as appropriations in other bills; (2) temporary appropriations made by valid budget amendment; and (3) statutory appropriations.

Temporary appropriations enacted by the Legislature as part of designated appropriation bills or sections designated as appropriations in other bills are subject to the provisions of Article V, section 11(4), of the Montana Constitution, providing that a general appropriation bill (*i.e*, HB 2) is limited to containing only appropriations for the ordinary expenses of the Legislative, Executive, and Judicial Branches, for interest on the public debt, and for public schools. Every other appropriation is required to be made by a separate bill containing only one subject. The appropriations made in HB 2 are an example of temporary appropriations.

Appropriations made by budget amendments are governed by the provisions of section 17-7-402, MCA. That section authorizes the "approving authority", as defined in 17-7-102, MCA, to appropriate money from certain enumerated sources upon compliance with certification provisions contained in section 17-7-403, MCA, and the procedural requirements of section 17-7-404, MCA. The Montana Supreme Court declared legislative committee approval of budget amendments invalid as an unconstitutional delegation of legislative power in violation of Article III, section 1, of the Montana Constitution. The power to approve budget amendments is properly exercisable only by either the entire Legislature or by an executive officer or agency to whom that authority is delegated and not by interim committee. *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 477-78, 543 P.2d 1317, 1321 (1975). As a matter of practice, budget amendments that are implemented by the Executive Branch do not appropriate general fund money. This is the case because budget amendments that contain any significant ascertainable commitment for any present or future increased general fund support are forbidden. Section 17-7-402(1)(b), MCA.

Statutory appropriations are governed by the provisions of section 17-7-502, MCA. A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state

agency without the need for a biennial legislative appropriation or budget amendment. With the exception of payment of the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations as they become due, to be effective, the law containing the statutory authority must be listed in section 17-7-502(3), MCA, and the law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in section 17-7-502, MCA.

The constitutional provisions and interpretations concerning appropriations are implemented by section 17-8-103(2), MCA, which provides that a condition or limitation contained in an appropriation act governs the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until the condition or limitation is changed by a subsequent appropriation act. In no event does a condition or limitation contained in an appropriation act amend any other statute. Section 17-8-101, MCA, provides that for purposes of complying with Article VIII, section 14, of the Montana Constitution, money deposited in the state general fund, the special revenue fund type (except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of certain statutorily authorized refunds, may be paid out of the treasury only on appropriation made by law.

Subject to certain limitations, money deposited in the enterprise fund type, debt service fund type, internal service fund type, private purpose trust fund type, agency fund type, and state special revenue fund from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation, may be paid out of the treasury by appropriation or under general laws or contracts entered into in pursuance of law permitting the disbursement if a subclass is established on the state financial system.

b. Expenditures That Are Subject to a Reduction Include All Three Types of "Appropriations Made by Law"

Given the above backdrop, it is easier to understand what general fund spending is subject to a reduction under 17-7-140, MCA. In the event of a certified projected general fund budget deficit, the Governor is required "to direct agencies to reduce spending in an amount ***that ensures that the projected ending general fund balance*** for the biennium will be at least 1% of all general fund appropriations during the biennium". Section 17-7-140(1)(a), MCA (emphasis added). There is no statutory exemption in section 17-7-140, MCA, for any type of appropriation. As such, that section gives the Governor the authority to reduce agency expenditures, subject to certain enumerated limitations, in order to increase the general fund balance for the biennium regardless of the type of appropriation authority allowing the expenditure. This includes temporary appropriations, appropriations made by budget amendments, and statutory appropriations. *See* item 3.a describing the three types of appropriations. Hence, if an agency ***receives*** general fund money during the biennium, that appropriation is subject to a reduction in spending.

However, there are certain situations where federal law may limit the extent of the reduction. For example, in order for the MUS to receive American Recovery and Reinvestment Act of 2009 (ARRA) State Fiscal Stabilization Funds (SFSF), Montana was required to provide funding for public higher education to the greater of fiscal year 2008 or 2009 levels. *See* ARRA, H.R. 1, 111th Cong. § 14002(a)(2). Since federal ARRA money was given for this purpose, any cuts that violate this purpose would conflict with federal law and would therefore be prohibited (absent a federal waiver).

There are also situations where the U.S. Constitution and the Montana Constitution may limit spending cuts. *See* Art. I, sec. 10, U.S. Const., and Art. II, sec. 31, Mont. Const. For example, there has been a great deal of publicity at both the state and federal level since December 29, 2009, regarding whether the City of Bozeman should use $49,140 of HB 645 money to construct new rubber-tiled tennis courts at a city park. *See* Amanda Ricker, *CNN in Bozeman Over Stim Spending on Tennis Courts,* Bozeman Daily Chronicle, January 14, 2010. The City Commissioners in Bozeman received criticism from Governor Schweitzer for their decision to use HB 645 money on the tennis courts, but there is no dispute among the parties that HB 645 gave the City of Bozeman the legal authority to make "recreation facility improvements". The ongoing dispute seems to revolve around whether the City of Bozeman should have spent the money on more essential projects, such as a water treatment plant. Since this is a current topic, it provides a good framework for a hypothetical example.

The "tennis court money" ultimately derives from HB 645, as the Department of Commerce was appropriated $25 million of state general fund money and $20 million of state special revenue money to distribute to school districts and local and tribal governments. *See* HB 645, section 57 and section 85, A-2 (line 3.b.). Of this money, $10 million was allocated to cites and towns, and the City of Bozeman chose to use part of its allocable share for the tennis courts. This money was not from federal stimulus funds. As such, once spending reductions under section 17-7-140, MCA go into effect, the City of Bozeman and other cities and towns that have not used their allocable shares of this general fund money could face a reduction in their future distributions. This is the case because the cities and towns receive the general fund money from the Department of Commerce, which in turn is subject to section 17-7-140, MCA. However, if a city or town has an existing contract for a project, then it may be inappropriate to cut funding.

The Contract Clause of the Montana Constitution provides that “[n]o ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature.” Art. II, sec. 31, Mont. Const. Similarly, the Contract Clause of the United States Constitution states that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts.” Art. I, sec. 10, U.S. Const. Pursuant to the holding in *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 41, 327 Mont. 306, 114 P.3d 1009, the Montana Supreme Court uses a three-part test when analyzing a Contracts Clause challenge:

> (1) Is the state law a substantial impairment to the contractual relationship?
>
> (2) Does the state have a significant and legitimate purpose for the law?

(3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

Additionally, when a state is a party to a contract or if its self-interest is at stake, a court uses a heightened level of scrutiny when evaluating the third prong of the test. As such, if the City of Bozeman has a contract in place to construct the tennis courts, then a reduction in funding may impair the contract, which gives rise to a Contract Clause issue. However, it should be noted that Contract Clause violations typically involve statutes that affect a party's right to do something, as opposed to a municipality's decreased funding from state government. Consequently, it is difficult to forecast how a court may respond to a mandated reduction in general fund spending that impairs a municipality's ability to pay for contracted services. The sound approach is clearly to forego spending cuts for cities and towns when a contract is already in place.

c. Expenditures That May or May Not be Subject to a Reduction

The OBPP letter stated that reductions may be directed from nongeneral fund appropriations when the reduction will increase the general fund balance. In other words, the OBPP position seems to imply that if a reduction in spending increases the general fund balance, then it is potentially fair game. This position could be interpreted to mean that agencies that only ***contribute*** to the general fund are subject to a cut. While an argument can be made regarding the correctness of this interpretation, it could be subject to a challenge.

Section 17-7-140(1)(a), MCA, calls for a mandatory reduction in agency spending at the program level by an amount that "ensures that the projected ending general fund balance for the biennium will be at least 1% of all general fund appropriations during the biennium". The state lottery system provides an example of a program that does not receive an HB 2 general fund appropriation, but the program contributes to the general fund on a quarterly basis. Section 23-7-402, MCA, provides:

> (1) A minimum of 45% of the money paid for tickets or chances must be paid out as prize money. The prize money is statutorily appropriated, as provided in 17-7-502, to the lottery.
>
> (2) Commissions paid to lottery ticket or chance sales agents are not a state lottery operating expense.
>
> (3) That part of all gross revenue not used for the payment of prizes, commissions, and operating expenses, together with the interest earned on the gross revenue while the gross revenue is in the enterprise fund, is net revenue. ***Net revenue must be transferred quarterly from the enterprise fund established by 23-7-401 to the state general fund.***
>
> (4) The spending authority of the lottery may be increased in accordance with this section upon review and approval of a revised operation plan by the office of budget and program planning. (emphasis added).

As shown in the emphasized portion above, a reduction in spending for the lottery program could add to the general fund balance on a quarterly basis, which in turn would increase the general

fund balance during this biennium. This example fits the portion of section 17-7-140(1)(a), MCA, stating that the Governor shall ensure "that the projected ending general fund balance for the biennium" is increased to the appropriate level. As such, an argument can be made for this interpretation, and agencies that do not receive general fund money could be subject to a cut. It should be noted that OBPP has yet to issue a spending reduction request to the lottery under the provisions of section 17-7-140, MCA.

A strong counterargument can also be made. Section 17-7-140, MCA, addresses reductions in general fund spending, not spending cuts from other funds that eventually increase the general fund balance. Section 17-7-140(1) provides:

> (1) (a) As the chief budget officer of the state, the governor shall ensure that the expenditure of appropriations does not exceed available revenue. Except as provided in subsection (2), in the event of a projected general fund budget deficit, the governor, taking into account the criteria provided in subsection (1)(b), shall direct agencies to reduce spending in an amount that ensures that the projected ending general fund balance for the biennium will be at least 1% of all general fund appropriations during the biennium. An agency may not be required to ***reduce general fund spending*** for any program, as defined in each general appropriations act, by more than 10% during a biennium. Departments or agencies headed by elected officials or the board of regents may not be required to ***reduce general fund spending*** by a percentage greater than the percentage of ***general fund spending reductions*** required for the total of all other executive branch agencies. The legislature may exempt from a reduction an appropriation item within a program or may direct that the appropriation item may not be reduced by more than 10%.
>
> (b) The governor shall direct agencies to manage their budgets in order to ***reduce general fund expenditures***. Prior to directing agencies to reduce spending as provided in subsection (1)(a), the governor shall direct each agency to analyze the nature of each program that ***receives a general fund appropriation*** to determine whether the program is mandatory or permissive and to analyze the impact of the proposed reduction in spending on the purpose of the program. (emphasis added).

When interpreting the meaning of a statute, courts first look to its plain language. *Mont. Sports Shooting Ass'n, Inc. v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003, citing *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288. The statute is read as a whole "without isolating specific terms from the context in which they are used by the Legislature". *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 134 P.3d 692. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it. Section 1-2-102, MCA. As applied here, the language "reductions in general fund spending" is specific, and it appears multiple times in the statute. Consequently, it is hard to interpret the statute as a whole to mean that any agency that contributes to the general fund is subject to a cut. Related to this is the canon of statutory construction known as *expressio unius est exclusion alterius*, which means the

expression of one thing in a statute implies the exclusion of another. *See Omimex Canada, Ltd. v. State*, 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3.

Nevertheless, when a statute may have some ambiguities due to a large variety of possible situations that are covered, a court is not required under due process standards to find vagueness in the terms used in a statute so as to destroy an act; rather, it is the court's duty to construe a statute so as to be consistent with the will of the Legislature and to comport with constitutional limitations. *In re Mont. Pac. Oil & Gas Co.*, 189 Mont. 11, 18, 614 P.2d 1045, 1049 (1980). Legislative intent may be determined in a number of ways when a statute is ambiguous. A court presumes that the Legislature would not pass a meaningless statute, and the court must harmonize statutes relating to the same subject so as to give each effect. The court can look to the legislative history of the statute. Great deference and respect must be given to interpretation of the statute by persons and agencies charged with its administration. *Mont. Contractors' Ass'n, Inc. v. Dept. of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986).

The legislative history suggests that the primary reason for amending section 17-7-140, MCA, was in response to *Nicholson v. Stephens*, Cause No. BDV-91-1864 (1st Judicial District, 1991). In *Nicholson*, Judge Sherlock developed a laundry list of reasons why the previous version of 17-7-140, MCA, was unconstitutional. One of the reasons was for "its failure to provide adequate guidance to the Governor". *Nicholson*, slip op. at 5. Another reason was the fact that there was "no establishment of legislative priorities as to what funds should be safeguarded by the Governor". Moreover, the court stressed that the statute was too permissive, as there was no requirement on the Governor to act during a deficit. With this background in mind, one can appreciate the importance of the statutory language that limits general fund spending reductions to a 10% level on a program-by-program basis. If section 17-7-140, MCA, is used to reduce spending for funds other than the general fund, then it can be argued that the statute does not provide enough guidance and that it is too permissive. Such an interpretation would give the Governor the ability to cut more than 10% from agencies that are structured like the lottery, as there is no 10% limit for an agency that operates as a business enterprise. As such, the sound approach is to limit reductions to those agencies that receive general fund money during the biennium.

d. Expenditure Cuts Must Contribute to the General Fund During This Biennium in Order to be Subject to Section 17-7-140, MCA

The OBPP letter stated that reductions may be directed from nongeneral fund appropriations when the reduction will increase the general fund balance. The OBPP then provided an example of the Coal Tax Shared Account, where the unexpended balance is transferred to the general fund. While this example may be subject to the issues mentioned in item 3.c. (regarding reductions in spending for programs that contribute to the general fund), it is also subject to another potential problem. OBPP did not provide a legal citation for the Coal Tax Shared Account, but a statutory appropriation of coal severance tax money is contained in section 15-35-108(3), MCA, which provides:

> (3) The amount of 5.46% must be credited to an account in the state special revenue fund to be allocated by the legislature for provision of basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking, conservation districts, and the Montana Growth Through Agriculture Act. Expenditures of the allocation may be made only from this account. Money may not be transferred from this account to another account other than the general fund. ***Beginning July 1, 2012, any unreserved fund balance at the end of each fiscal year must be deposited in the general fund.*** (emphasis added).

Section 17-7-140, MCA, provides that "in the event of a projected general fund budget deficit, the governor . . . shall direct agencies to reduce spending . . . for the biennium". As provided in section 15-35-108, MCA, any reduction in spending by libraries and the other entities may add to the general fund balance in the long run, but this does not transpire until the next biennium (*i.e.*, July 1, 2012). As such, section 17-7-140, MCA, cannot be used to reduce spending for the libraries and the other entities listed in section 15-35-108(3), MCA. This example highlights the importance of analyzing whether a reduction increases the general fund balance for this biennium.

e. Expenditures Cuts for Language Appropriations and Nonbudgeted Transfers

The OBPP letter stated that reductions may be directed from language appropriations and nonbudgeted transfers when the reduction will increase the general fund balance. The term "language appropriation" is not defined in the MCA. Indeed, there are only three types of appropriations, as discussed in item 3.a. However, a publication[4] by the LFD defines a language appropriation as an appropriation made in the language of HB 2, rather than in program or line item appropriations. The LFD publication provides that a language appropriation may be desirable for specific events that may or may not happen, such as a potential environmental impact study. However, LFD cautions that language appropriations can be troublesome because appropriated funds are not included in the HB 2 totals and may be overlooked in examining the ending fund balance.

Using the LFD definition, a language appropriation is essentially a temporary appropriation, and a reduction in general fund spending from a language appropriation is therefore permissible unless the Legislature exempted it from a reduction in spending. *See* item 3.b. However, issues may arise when determining whether a language appropriation should be subject to a 10% reduction in spending when a contingency has not yet occurred. For example, if a program has a $2 million general fund appropriation for operating costs and another $2 million general fund language appropriation for a contingent event, is the 10% reduction in spending calculated using $4 million or $2 million? Logically, if the contingent event has not occurred, then the 10% limit should be calculated using the $2 million general fund appropriation. Any other interpretation would subject the program to a 20% reduction in spending. Similar to language appropriations, the term "nonbudgeted transfer" is not defined in the MCA, and I could not find a definition in LFD materials. However, it is my understanding that a nonbudgeted transfer is one that was not

[4]Legislative Fiscal Division, *HB 2 The Barbarian*, at 41 (Nov. 2008).

appropriated (budgeted) in HB 2, but under which the law requires money to be transferred from the general fund to another account. For illustration, section 15-1-122, MCA, mandates fund transfers from the state general fund to various "accounts, entities, or recipients", including an adoption services account, a motor vehicles recycling and disposal program, a noxious weeds account, a state special revenue fund to the credit of the Department of Fish, Wildlife, and Parks, state veterans' accounts, a senior citizens and persons with disabilities transportation services account, and a search and rescue account. In order to calculate the amount of the transfers in section 15-1-122, MCA, specific percentages are listed for the amounts of the transfers. For example, the motor vehicle recycling and disposal program receives 1.48% of motor vehicle revenue deposited in the general fund each fiscal year. Section 15-1-122(4), MCA, then provides that the transfer "must be appropriated as state special revenue in the general appropriations act for the designated purposes".

Using section 15-1-122, MCA, as a guide for what constitutes a "nonbudgeted transfer", the next question is whether these transfers are subject to a reduction in spending. Section 17-7-140, MCA, generally provides that agencies shall *reduce general fund spending* for programs, but it does not address transfers. In situations such as this one, a court first looks at the plain language of the statute to determine if an ambiguity exists. *Mont. Sports Shooting Ass'n, Inc. v. State*, 2008 MT 190, ¶ 11 (citing *Letasky*, 2007 MT 51, ¶ 11). If the statutory language is clear and unambiguous, the statute speaks for itself and there is nothing left for a court to construe. *Mont. Contractors' Ass'n, Inc. v. Dept. of Highways*, 220 Mont. 392, 394, 715 P.2d 1056, 1058 (1986).

A strong argument can be made that spending and transfers are not the same thing. This conclusion is supported by the commonly understood meaning of these relevant terms. "Spending" is not defined in the most popular legal dictionary, but a reference is given to "appropriations bill", which in turn is defined as "a bill that authorizes governmental expenditures." *Black's Law Dictionary* (9th ed. 2009). Additionally, "transfer" means to "convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of".

Moreover, in 1992, Attorney General Racicot had the opportunity to address the difference between spending money and transferring money to another state account. *See* 44 A.G. Op. 43 (1992). In his opinion, Attorney General Racicot responded to a question regarding the validity of a statute that required the State Auditor to pay the Administrator of the Public Employees' Retirement Division money that was collected from insurance taxes, despite the fact that an appropriation did not exist. In determining that the statute was valid, the opinion recognized that Article VIII, section 14, of the Montana Constitution requires an appropriation when money is "paid out of the treasury". However, the opinion also addressed the fact that when money is "transferred between accounts *within* the state treasury", an appropriation is not required. Consequently, the statute requiring the transfer of money from one fund to another was considered valid because a transfer between funds was not synonymous with spending money from the state treasury.

The rational behind Attorney General Racicot's opinion is directly relevant here. When money is expended through an appropriation, it no longer exists as an asset of the state. However, when

money is transferred from the general fund to another account, entity, or recipient, it still exists in another fund, and an appropriation is not required. Moreover, the entity or recipient of the transfer may spend the money only if an appropriation exists, and section 15-1-122, MCA, specifically mentions that the amounts transferred from the general fund must be appropriated as state special revenue. As such, there does not appear to be a basis for reducing a transfer under the provisions of section 17-7-140, MCA. In addition, there could be situations where an appropriation never exists but the transfer is still mandated by the statute. When this occurs, it is the Legislature that decides how to spend the unexpended transferred funds, not the Executive Branch.

4. CONSIDERATIONS FOR THE NEXT SESSION

Even with an ordered reduction in the spending of appropriations, the appropriations still exists in law until the expiration of the biennium for which the appropriations were made. *See* item 1. As such, the Legislature should decide whether to adjust appropriations for this biennium to reflect any gubernatorially ordered reductions in spending. If the Legislature chooses not to adjust appropriations to conform to the statutorily authorized reductions in spending, then a person reading the law will be misled as to the true level of the money available for a particular function. Moreover, without a reduction in appropriations, the Governor may again be required to reduce spending under section 17-7-140, MCA.

The Legislature should also consider whether savings from Executive Branch spending reductions that did not contribute to the general fund should revert to the general fund, while at the same time considering elimination of the appropriation. For example, on December 22, 2009, Governor Schweitzer announced that "taxpayers will keep $4.5 million in the bank as a result of not renovating the Receiving Hospital Building on the Montana State Hospital Campus". Press Release, Governor Brian Schweitzer, Governor Announces $4.5 Million in Savings – No Renovations at Receiving Hospital (December 22, 2009). This funding was contained in House Bill No. 4 (HB 4) from the May 2007 Special Session, which provided, among other things, for a transfer of $4.5 million from the general fund to the long-range building program account to renovate/improve support services at the Montana State Hospital. Secs. 2, 3, Ch. 3, Sp. L. May 2007.

Section 17-2-102, MCA, requires strict accountability for all revenue received and spent, and various fund types are set up for this purpose. Under section 17-2-102(1)(a), MCA, the general fund is classified as part of the governmental fund category. However, money deposited in the long-range building program account is part of the capital projects fund type, which is separate and distinct from the governmental fund category. *See* section 17-7-205(1), MCA, and section 17-2-102(1)(c), MCA. Additionally, section 17-7-139, MCA, provides that the approving authority may not transfer appropriations from one fund type to another. As applied here, section 17-7-139, MCA, prohibits the Governor from transferring the $4.5 million appropriation from the long-range building program account to the general fund. Moreover, section 17-8-103(2), MCA, provides that a condition or limitation contained in an appropriation act governs the administration and expenditure of the appropriation until the appropriation is expended or until the limitation is changed by a subsequent appropriations act. As such, only the Legislature can

transfer the $4.5 million appropriation to the general fund, and if it chooses to do so it should also eliminate the $4.5 million appropriation in HB 4.

Thank you for the opportunity to provide you with this analysis. Please let me know if you have any additional questions or concerns.

Sincerely,

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