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DOUG STERNBERG

**Montana Legislative
Services Division
Legal Services Office**

PO BOX 201706
Helena, Montana 59620-1706
(406) 444-3064
FAX (406) 444-3036

Attorneys
BARTLEY J. CAMPBELL
LEE HEIMAN
VALENCIA LANE
JOHN MACMASTER
EDDYE MCCLURE
DAVID S. NISS

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Gary Hamel
Legislative Fiscal Division
Room 110, Capitol Building
P.O. Box 201711
Helena, MT 59620-1711

Dear Mr. Hamel:

I am writing in response to your request for an analysis on the proposed use of certain state special revenue funds by the Department of Natural Resources and Conservation (DNRC).

The narrative in House Bill No. 2, enacted as Chapter 572, Laws of 2001, provides:

State special revenue appropriations in item 6 may be used for firefighting costs. It is the intent of the legislature to replace any state special revenue expenditures with a general fund supplemental appropriation in the next legislative session.

Item 6 in House Bill No. 2 is for the Forestry and Trust Lands Division of DNRC. It is unclear from the narrative whether the "item" referred to in the narrative is exclusively item 6 or whether the "item" also contains the 9 specific line item appropriations from state special revenue funds for the current biennium. One of the item appropriations is designated as "restricted". Section 4 of House Bill No. 2 defines a "restricted" appropriation as one that may be used during the biennium only for the purpose designated by its title and as presented to the Legislature. Based upon this definition, the narrative allowing the special revenue appropriation in item 6a to be used for firefighting costs conflicts with the restricted designation.

You have indicated that DNRC has identified four state special revenue accounts that have

spending authority in excess of their immediate needs and that DNRC intends to use the spending authority to pay for approximately \$3.5 million for fire costs incurred in fiscal 2002. You have indicated that the four state special revenue accounts are the forest land fire protection account provided for in section 76-13-209, MCA; the trust land administration account established in section 77-1-108, MCA; the state timber sale account established in section 77-1-613, MCA; and the forest improvement fee account provided for in section 77-5-204, MCA. You have also indicated that DNRC lacks cash in the accounts and that DNRC has indicated that they will attempt to obtain an interaccount loan pursuant to section 17-2-107, MCA, in order to obtain the cash to fund the spending authority in the accounts.

Section 17-8-103(2), MCA, provides that a condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until such condition or limitation is changed by a subsequent appropriation act. Section 17-8-103(2), MCA, also provides that a condition or limitation in an appropriation act may not amend a statute. That statute implements Article V, section 11(4), of the Montana Constitution, which provides that a general appropriation bill shall contain only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools. In State ex rel. Davidson et al. v. Ford, 115 Mont. 165, 141 P.2d 373 (1943), the Montana Supreme Court construed similar language from the 1889 Montana Constitution. The Court held that so long as the incidental provisions of an appropriation bill are germane to the purposes of the appropriation it does not conflict with any constitutional provision. To sustain the contention that the general appropriation bill should contain nothing save the bare appropriations of money and that the provision for the expenditure of the money, or its accounting, could not be included in the general appropriations act would lead to results so incongruous that it must be presumed that the framers of the Constitution had no such intent. In City of Helena v. Omholt, 155 Mont. 212, 468 P.2d 764 (1970), the Montana Supreme Court held that an appropriation bill containing eligibility requirements and restrictions on disbursements of the appropriated funds in a manner contrary to an existing statute was void. The title of the bill indicated that the bill was an appropriation bill, not a substantive bill. The Court declined to address the doctrine of repeal by implication, concluding that appropriation bills should not be held to amend substantive statutes by implication. In 39 A.G. Op. 25 (1981), Attorney General Greely was asked to construe a bill providing grants for District Courts. The Attorney General concluded that restrictive language in the general appropriations act conflicted with an existing statute. The Attorney General held that the condition in the general appropriations act was invalid.

The narrative in House Bill No. 2, providing that state special revenue appropriations in item 6 may be used for firefighting costs and establishing the intent of the Legislature to replace any state special revenue expenditures with a general fund supplemental appropriation in the next legislative session, conflicts with existing statutes and would be invalid if challenged.

Section 17-8-103(1), MCA, provides that it is unlawful for a department to expend or incur obligations in any one year in excess of the legislative appropriation for that year. It is the duty of departments to keep expenditures and obligations within the amount of a legislative appropriation. Section 17-7-301(1), MCA, provides that an agency may make expenditures

during the first fiscal year of a biennium from appropriations for the second fiscal year of a biennium if authorized by the general appropriations act. The proposed use of the second fiscal year appropriation must be submitted to the approving authority and must be accompanied by a plan for reducing expenditures in the second year of the biennium that allows the agency to contain expenditures within appropriations. Section 17-7-301(7)(b), MCA, provides that an agency may not transfer funds between fund types in order to implement a plan. Section 17-7-301(2), MCA, provides that the plan for reducing expenditures is not required if the proposed supplemental appropriation is due to an unforeseen and unanticipated emergency for fire suppression.

It has long been established that a Legislature may not bind a future Legislature to appropriate money, except through the creation of long-term debt. See Huber v. Groff, 171 Mont. 442, 558 P.2d 1124 (1976), and Grossman v. State Department of Natural Resources, 209 Mont. 427, 682 P.2d 1319 (1984). Therefore, the narrative statement expressing "legislative intent" to replace any state special revenue expenditures with a general fund supplemental appropriation in the next legislative session is meaningless at best.

In order to determine if the narrative authorizing state special revenue appropriations in "item 6" to be used for firefighting costs is appropriate, it is necessary to examine the statutory provisions governing the programs for which the funds were appropriated. I will limit my analysis to the four state special revenue accounts indicated in your request. The forest land fire protection account is provided for in section 76-13-209, MCA. Section 76-13-201, MCA, provides that an owner of land classified as forest land by DNRC shall protect against the starting or existence of fire and shall suppress the spread of fire on that land. This protection and suppression must be in conformity with reasonable rules and standards for adequate fire protection adopted by DNRC. If the owner does not provide for the protection and suppression, DNRC may provide it at a cost to the landowner of not more than \$30 for each landowner in the protection district and of not more than an additional 20 cents per acre per year for each acre in excess of 20 acres owned by each landowner in each protection district, as necessary to yield the amount of money provided for in section 76-13-207, MCA. Section 76-13-207, MCA, provides that DNRC shall prepare an annual operation assessment plan in which fire protection costs are determined. DNRC is required to request the Legislature to appropriate the state's portion of the cost. After the appropriation is made by the Legislature, DNRC causes an assessment to be made on the owners of classified forest land sufficient to bring the total amount received from the landowners to no greater than one-third of the amount specified in the appropriation. The Department of Revenue collects the assessments along with state and county property taxes. The assessments are deposited in the state special revenue account pursuant to section 76-13-209, MCA. Section 76-13-111, MCA, provides that money collected by County Treasurers as assessments on forest lands for forest protection may be expended as directed by DNRC for fire prevention, detection, and suppression and for forest range, water, and soil conservation. The use of funds in the state special revenue account provided for in section 76-13-209, MCA, are specifically authorized to be used for fire suppression costs.

The second state special revenue account is the trust land administration account established in section 77-1-108, MCA. That section provides that money in the account is available to DNRC

by appropriation and must be used to pay the costs of administering state trust lands. Section 77-1-109, MCA, provides for depositing funds into the trust land administration account. It provides that until the deposit equals the amount appropriated for the fiscal year pursuant to section 77-1-108, MCA, DNRC shall deposit into the trust land administration account mineral royalties, the proceeds or income from the sale of easements and timber, except timber from public school and Montana university system lands, and 5% of the interest and income annually credited to the public school fund in accordance with section 20-9-341, MCA. Section 77-1-109(3), MCA, provides that the amount of money that is deposited into the trust land administration account may not exceed 1 1/8% of the book value balance in each of the nine permanent funds administered by DNRC on the first day of January preceding the new biennium and 10% of the previous fiscal year revenue deposited into the capitol building land grant trust fund. Section 77-1-108(3), MCA, provides that unreserved funds remaining in the trust land administration account at the end of a fiscal year must be transferred to each of the permanent funds in proportionate shares to each fund's contribution to the account as calculated in section 77-1-109(3), MCA. I questioned the constitutionality of the funding mechanism at the time the trust land administration account was established, but the Legislature rejected my concerns. It appears that the trust land administration account could be used for firefighting costs incurred on state land as a cost of administering those lands. Any use of the trust land administration account for firefighting costs that did not occur on state lands would violate section 77-1-108(1), MCA. At the end of a fiscal year, funds would have to be reserved for the purpose of paying firefighting costs to avoid conflicting with the requirement of section 77-1-108(3), MCA.

The third state special revenue account is the state timber sale account established in section 77-1-613, MCA. That section provides that there must be placed in the account an amount from timber sales on state lands each fiscal year equal to the amount appropriated from the account for the corresponding fiscal year. Timber sale program funds deducted for deposit in the account must be directly applied to timber sale preparation and documentation. Money in the account may be appropriated by the Legislature for use by DNRC in the manner set out in section 77-1-613, MCA, to enhance the revenue creditable to the trusts supported by the timber sales. The use of money in the account for firefighting costs would violate the statutory requirement that the money in the account be used for timber sale preparation and documentation.

The fourth state special revenue account is the forest improvement fee account provided for in section 77-5-204, MCA. Money for the account is derived from timber sales on state land. Section 77-5-204(4), MCA, provides that in addition to the price of the timber established under section 77-5-204(1), MCA, the Board of Land Commissioners may require a timber purchaser to pay a fee for forest improvement. Revenue from the fee must be deposited in the state special revenue fund to the credit of DNRC. The money in the account, as appropriated by the Legislature, may be used only for disposing of logging slash; acquiring access and maintaining roads necessary for timber harvesting on state lands; reforestation, thinning, and otherwise improving the condition and income potential of forested state lands; and complying with legal requirements for timber harvesting. Therefore, the use of money in the account for firefighting costs would violate the statutory restrictions on the use of the account.

As discussed earlier, you have also indicated that DNRC lacks cash in the specified accounts and

DNRC has indicated that they will attempt to obtain an interaccount loan pursuant to section 17-2-107, MCA, in order to obtain the cash to fund the spending authority in the accounts. Section 17-2-107(2)(a), MCA, provides that subject to section 17-2-105, MCA, when the expenditure of an appropriation from a fund designated in section 17-2-102(1) through (3), MCA, is necessary and the cash balance in the accounting entity from which the appropriation was made is insufficient, the Department of Administration may authorize a temporary loan, bearing no interest, of unrestricted money from other accounting entities if there is reasonable evidence that the income will be sufficient to repay the loan within 1 calendar year and if the loan is recorded in the state accounting records. An accounting entity receiving a loan or an accounting entity from which a loan is made may not be so impaired that all proper demands on the accounting entity cannot be met even if the loan is extended.

It appears that DNRC is contemplating using a procedure that has already been determined to be inappropriate. In 42 A.G. Op. 123 (1988), Attorney General Greely determined that an interaccount loan was not appropriate to provide a loan of \$11.4 million to the Department of State Lands (now DNRC) from the state's general fund to be repaid by a subsequent appropriation of the same amount from the general fund. The Attorney General held that an interaccount loan may not be made to a special revenue account when the borrower anticipates no income, other than the possibility of a supplemental appropriation sometime in the future, with which to repay the loan. The reliance on the possibility of a supplemental appropriation does not meet the requirement of reasonable evidence of future income under the interaccount loan statute.

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