

# **SPENDING NONGENERAL FUND MONEY FIRST – STATUTES HAVE LIMITED APPLICATION**

A Report Prepared for the  
**Legislative Finance Committee**

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April 16, 2008

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## INTRODUCTION

Montana statute includes a provision that directs agencies to spend nongeneral fund money first, whenever other funds are available to be spent before a state general fund appropriation. Another section of statute that provides authority for a supplemental appropriation, also suggests that expenditures be made from other available sources (“other income”) before pursuing a general fund supplemental appropriation transfer.

Legislative Fiscal Division (LFD) staff has, over the years, interpreted and applied these two statutes as requiring an agency to offset general fund costs with all other available funds whenever possible, including funds available in other programs of the agency. A recent review by Legislative Services Division (LSD) legal staff concluded that the statutes apply much more narrowly than the historic LFD interpretation and application.

There are two issues for consideration by the Legislative Finance Committee (LFC). The first is to clarify legislative policy regarding spending other available funding sources before spending general fund as provided in both statutes.

- If the legislative policy is that general fund expenditures must be offset in all instances when other funds within an agency are available to do so, then changes to statute are needed.
- If, however, the legislative policy is to allow the approving authority<sup>1</sup> discretion to decide whether or not to minimize general fund expenditures by considering all available appropriations or money within an agency, then no changes are needed to statute.

The second issue is to clarify the meaning of the term “income” as used in the statute dealing with supplemental transfer appropriations. If the LFC wishes to define “income” it would require a statutory change.

## SPENDING OTHER FUNDS BEFORE GENERAL FUND

LFD staff has historically interpreted two statutes to require an agency to offset general fund costs with nongeneral fund money whenever possible.<sup>2</sup> The first statute, a requirement to spend nongeneral fund prior to the expenditure of general fund, is the first section of 17-2-108.

*17-2-108. Expenditure of nongeneral fund money first. (1) Except for the exemptions applicable to the Montana historical society in 22-3-114(5), the Montana state library in 22-1-226(5), the Montana school for the deaf and blind in 20-8-107(5), and the department of public health and human services in 53-1-612, an office or entity of the executive, legislative, or judicial branch of state government shall apply expenditures against appropriated nongeneral fund money whenever possible before using general fund appropriations [underline emphasis added].*

The second example is drawn from statutes that govern a supplemental appropriation transfer request. The sentence referenced is drawn from 17-7-301(1), which establishes the criteria to authorize expenditure of funds during first year of biennium from appropriations for the second year due to a cost overrun.

*17-7-301. Authorization to expend during first year of biennium from appropriation for second year - - proposed supplemental appropriation defined -- limit on second-year expenditures. (1) ...If the approving authority finds that, due to an unforeseen and unanticipated emergency, the amount actually*

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<sup>1</sup> The approving authority for the executive branch is the governor or the governor's designated representative for executive branch agencies; the chief justice of the supreme court or the chief justice's designated representative for judicial branch agencies; the speaker for the house of representatives; the president for the senate; appropriate legislative committees or a designated representative for legislative branch agencies; or the board of regents of higher education or its designated representative for the university system

<sup>2</sup> The Legislative Auditor also has interpreted this statute to apply across programs within an agency. Audit findings in the Financial Compliance Audit of the Department of Revenue for the Two Fiscal Years ended June 30, 1999 and Financial Compliance Audit of the Department of Public Health and Human Services for the Two Fiscal Years ended June 30, 2000 interpreted the statutory requirement to spend nongeneral fund first to apply to all agency appropriations.

*appropriated for the first fiscal year of the biennium with all other income will be insufficient for the operation and maintenance of the agency during the year for which the appropriation was made, the approving authority shall, after careful study and examination of the request and upon review of the recommendation for executive branch proposals by the budget director, submit the proposed supplemental appropriation to the legislative fiscal analyst [underline emphasis added].*

LFD staff has relied on these two statutes for issues raised as part of LFC review of supplemental appropriation transfer requests during the interim, and the legislature's review and action on supplemental appropriation requests during legislative sessions. Staff has also used the statutes as the legal basis for issues to lower general fund costs without reducing service levels, both in the LFD executive budget analysis and staff reports to the LFC. Staff has routinely interpreted the statutes to apply in any instance where other funds (primarily state special and federal revenue) could be used to reduce or offset general fund costs without reducing services.

Review by LSD legal staff concluded that the two statutes directing expenditure of nongeneral fund prior to general fund "whenever possible" and the reduction of a general fund supplemental appropriation with other "income" are controlling only for transactions *within a single program*. This interpretation is much narrower than the historic LFD interpretation that the statutes apply to all expenditures and appropriations *across all programs within an agency*. For instance, the LFD has interpreted these statutes to require an agency to offset general fund expenditures in program A using excess state special revenue, federal funds, or other money transferred from program B.

The legislative staff legal interpretation that general fund cost reductions are mandated only for costs incurred within a program is based on 17-7-139, which governs transfer of appropriations among programs. The first sentence in section 1 of 17-7-139 states:

*"Unless prohibited by law or a condition contained in the general appropriations act, the approving authority may approve agency requests to transfer appropriations between programs within each fund type within each fiscal year [emphasis added]."*

The transfer of appropriation authority among programs is discretionary, subject to the authorization of the approving authority. The staff legal analysis concluded that because the authority to transfer appropriations among programs is discretionary, the statutes governing offset of general fund costs do not apply in situations where appropriations must be transferred among programs to offset general fund costs. Therefore, the statutes requiring the offset of general fund costs "whenever possible" do not apply in every instance where there are other funds available that could be used to reduce general fund costs.

An agency is not required to spend nongeneral fund first if the approving authority declines to approve a transfer of nongeneral fund authority from one program to offset general fund costs in another program. This interpretation is particularly important in supplemental general fund expenditures because the program with a cost overrun would have expended all other funds to offset as much general fund as possible and the only other funds available to offset the general fund supplemental would be in other programs.<sup>3</sup> Under the recent opinion of legal staff, if there were other funds available to offset a general fund supplemental appropriation, including excess general fund in other programs, the approving authority would have discretion as to whether to reduce a general fund supplemental request by transferring funds from other programs.

## **EXAMPLE DEMONSTRATING THE ISSUE**

Figure 1 shows an example of and the potential outcomes under the different interpretation of the statutes. The scenarios in Figure 1 show a general fund cost in program A of \$3.0 million. Two other programs (B and C) together have \$1.5 million in other special revenue that could be used to offset the general fund cost.

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<sup>3</sup> Statutes governing supplemental appropriation transfer requests require an agency to have a plan to reduce expenditures to avoid a cost overrun in the second year of the biennium. In some instances, the legislature has chosen to fund a supplemental appropriation in the second year of the biennium rather than allow the plan to be implemented.

Using the historic LFD interpretation of statutes, the agency would be required to transfer funds from programs B and C to program A, and reduce total general fund costs by \$1.5 million. However, the recent legal staff interpretation is that statutes do not require the agency transfer funds among programs to reduce general fund costs. The approving authority could decide to forego some or all of transfer. If the approving authority did not require an agency to transfer funds from programs B and C, none of the \$3 million general fund cost would be reduced, as shown in the final scenario in Figure 1.

In reviewing supplemental appropriation transfer requests in June 2006, LFD staff identified two state special revenue appropriations<sup>4</sup> with excess authority (and sufficient cash) that could have been used to offset a portion of a general fund supplemental transfer appropriation request in FY 2006. The 2007 Legislature subsequently approved a supplemental general fund appropriation in FY 2007, rather than reducing services.

At the end of FY 2007, LFD staff again identified excess state special revenue that could be used to partially offset the general fund supplemental cost and result in a higher reversion from the supplemental appropriation. The excess money resided in programs that did not have a general fund cost overrun. The approving authority declined to transfer appropriations among programs and did not use the excess state special revenue to reduce the supplemental general fund appropriation. The decision was made during fiscal year end close in mid July, so LFD staff could not raise the issue for LFC consideration at the June 2007 meeting. Approving authorities have usually required agencies to use excess appropriations/money in other funds to offset general fund expenditures.<sup>5</sup>

This issue is raised for LFC consideration to clarify legislative policy. In practice, because of the way fiscal staff interpreted and applied these statutes, legislators may have believed that agencies were required to offset general fund costs using all available excess state and federal special funds within an agency. If the legislature desires that general fund costs be offset whenever possible and that all available nongeneral fund appropriations and money throughout an agency be used to do so, amendments to statute would be needed.

## MEANING OF INCOME

A second issue is the meaning of income as used in the supplemental appropriation transfer statute (17-7-301). As noted previously, the approving authority must determine that “the amount actually appropriated for the first fiscal year of the biennium with all other income will be insufficient” to operate for the remainder of the year. Income is not defined in Title 17 and it is an archaic term. The legislature may wish to specify what “income” means or replace the word income. Within the context of the statute, income could be replaced by the words “all other available nongeneral fund money and excess general fund money in other programs”.

Figure 1 Hypothetical Scenarios Comparing General Fund Costs Fund Transfer is Mandatory Versus Discretionary				
Scenarios/Excess Nongeneral Fund/Effect if Fund Transfer is Required or is Discretionary	General Fund Cost	Excess Federal Spec. Rev.	Excess State Spec. Rev.	Remaining General Fund Cost
<b>Example of General Fund Cost</b>				
Program A - General Fund Cost	\$3,000,000			
Program B - Excess Federal Revenue		\$1,200,000		
Program C - Excess State Special Revenue			\$300,000	
<b>General Fund Offset is Required - Fund Transfer is Mandatory</b>				
Program A - General Fund Cost	\$3,000,000			\$1,500,000
Program A - Funds Transferred from B and C		\$1,200,000	\$300,000	
Program B Transfers Federal Funds to Program A		0		
Program C Transfers State Special Revenue to Program A Transfer to Program A			0	
<b>General Fund Offset is Discretionary - Fund Transfer not Required</b>				
Program A - General Fund Cost	\$3,000,000			\$3,000,000
Program A - No Funds Transferred from B and C				
Program B - Transfer Not Required		\$1,200,000		
Program C - Transfer Not Required			\$300,000	

<sup>4</sup> The general fund services to be offset were within statutory restrictions for use of the excess state special revenue funds.

<sup>5</sup> At the end of FY 2007, the Office of Budget and Program Planning did not require the Department of Public Health and Human Services to offset a portion of the general fund supplemental appropriation with tobacco tax state special revenue.

## OPTIONS

Issue 1: Require that an agency offset general fund expenditures whenever there is excess nongeneral fund money that could be used to do so.

- A. The LFC could request a bill draft to require that whenever available, all nongeneral fund money be used prior to general fund within an agency and to require that all available nongeneral fund money and excess general fund money within an agency be used to offset a supplemental transfer appropriation request and a supplement general fund appropriation.
- B. The LFC could request a bill draft request to augment Option A by allowing the legislature to “exempt” certain nongeneral fund appropriations from consideration to offset general fund by specifically designating those nongeneral fund appropriations in the general appropriations act.

Issue 2: Define the meaning of income as it is used in 17-7-301(1) or replace the word income.

The LFC could request a bill draft to:

- A. Define “income” as all other nongeneral fund money available
- B. Augment the statute after “income” to include all other available nongeneral fund money

## APPENDIX A

### FULL TEXT OF STATUTES DISCUSSED IN THIS REPORT

Statutes are listed in the order discussed in the report

17-2-108. Expenditure of nongeneral fund money first. (1) Except for the exemptions applicable to the Montana historical society in 22-3-114(5), the Montana state library in 22-1-226(5), the Montana school for the deaf and blind in 20-8-107(5), and the department of public health and human services in 53-1-612, an office or entity of the executive, legislative, or judicial branch of state government shall apply expenditures against appropriated nongeneral fund money whenever possible before using general fund appropriations.

(2) Except as provided in 53-1-612, the approving authority, as defined in 17-7-102, shall authorize the decrease of the general fund appropriation of an agency by the amount of money received from federal sources in excess of the appropriation in an appropriation act unless the decrease is contrary to federal law, federal rule, or a contract or unless the approving authority certifies that the services to be funded by the additional money are significantly different than those for which the agency received the general fund appropriation. If directed by an appropriation act, the approving authority shall decrease the general fund appropriation of an agency by the amount of money received from nonfederal sources in excess of the appropriation unless the decrease is contrary to state law, state rule, or a contract or unless the approving authority certifies that the services to be funded by the additional money are significantly different than those for which the agency received the general fund appropriation. If the general fund appropriation of an agency is decreased pursuant to this section, the appropriation for the fund in which the money is received is increased in the amount of the general fund decrease.

(3) If directed by an appropriation act, the approving authority may decrease a state special revenue, proprietary, or other fund appropriation of an agency by the amount of money received from federal sources in excess of the appropriation unless the decrease is contrary to state or federal law or federal rule. The appropriation for the fund in which the money is received is decreased by the amount of the federal special revenue increase allowed by law, rule, or contract and approved for the purpose.

History: En. Sec. 4, Ch. 194, L. 1951; amd. Sec. 1, Ch. 101, L. 1953; amd. Sec. 8, Ch. 158, L. 1959; amd. Sec. 3, Ch. 267, L. 1971; amd. Sec. 45, Ch. 326, L. 1974; R.C.M. 1947, 82-109(2); amd. Sec. 1, Ch. 352, L. 1989; amd. Sec. 3, Ch. 787, L. 1991; amd. Sec. 4, Ch. 4, L. 1993; amd. Sec. 3, Ch. 339, L. 1995; amd. Sec. 1, Ch. 332, L. 2003; amd. Sec. 4, Ch. 576, L. 2003; amd. Sec. 1, Ch. 151, L. 2005.

17-7-301. Authorization to expend during first year of biennium from appropriation for second year -- proposed supplemental appropriation defined -- limit on second-year expenditures. (1) An agency may make expenditures during the first fiscal year of the biennium from appropriations for the second fiscal year of the biennium if authorized by the general appropriations act. An agency that is not authorized in the general appropriations act to make first-year expenditures may be granted spending authorization by the approving authority upon submission and approval of a proposed supplemental appropriation to the approving authority. The proposal submitted to the approving authority must include a plan for reducing expenditures in the second year of the biennium that allows the agency to contain expenditures within appropriations. If the approving authority finds that, due to an unforeseen and unanticipated emergency, the amount actually appropriated for the first fiscal year of the biennium with all other income will be insufficient for the operation and maintenance of the agency during the year for which the appropriation was made, the approving authority shall, after careful study and examination of the request and upon review of the recommendation for executive branch proposals by the budget director, submit the proposed supplemental appropriation to the legislative fiscal analyst.

(2) The plan for reducing expenditures required by subsection (1) is not required if the proposed supplemental appropriation is:

- (a) due to an unforeseen and unanticipated emergency for fire suppression;

(b) requested by the superintendent of public instruction, in accordance with the provisions of 20-9-351, and is to complete the state's funding of guaranteed tax base aid, transportation aid, or equalization aid to elementary and secondary schools for the current biennium; or

(c) requested by the attorney general and:

(i) is to pay the costs associated with litigation in which the department of justice is required to provide representation to the state of Montana; or

(ii) in accordance with the provisions of 7-32-2242, is to pay costs for which the department of justice is responsible for confinement of an arrested person in a detention center.

(3) Upon receipt of the recommendation of the legislative finance committee pursuant to 17-7-311, the approving authority may authorize an expenditure during the first fiscal year of the biennium to be made from the appropriation for the second fiscal year of the biennium. Except as provided in subsection (2), the approving authority shall require the agency to implement the plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations.

(4) The agency may expend the amount authorized by the approving authority only for the purposes specified in the authorization.

(5) The approving authority shall report to the next legislature in a special section of the budget the amounts expended as a result of all authorizations granted by the approving authority and shall request that any necessary supplemental appropriation bills be passed.

(6) As used in this part, "proposed supplemental appropriation" means an application for authorization to make expenditures during the first fiscal year of the biennium from appropriations for the second fiscal year of the biennium.

(7) (a) Except as provided in subsections (2) and (7)(b), an agency may not make expenditures in the second year of the biennium that, if carried on for the full year, will require a deficiency appropriation, commonly referred to as a "supplemental appropriation".

(b) An agency shall prepare and, to the extent feasible, implement a plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations. The approving authority is responsible for ensuring the implementation of the plan. If, in the second year of a biennium, mandated expenditures that are required by state or federal law will cause an agency to exceed appropriations or available funds, the agency shall reduce all nonmandated expenditures pursuant to the plan in order to reduce to the greatest extent possible the expenditures in excess of appropriations or funding. An agency may not transfer funds between fund types in order to implement a plan.

History: En. Sec. 1, Ch. 82, L. 1961; R.C.M. 1947, 79-1019; amd. Sec. 1, Ch. 11, Sp. L. January 1992; amd. Sec. 1, Ch. 357, L. 1993; amd. Sec. 17, Ch. 347, L. 1997.

17-7-139. Program transfers. (1) Unless prohibited by law or a condition contained in the general appropriations act, the approving authority may approve agency requests to transfer appropriations between programs within each fund type within each fiscal year. The legislature may restrict the use of funds appropriated for personal services to allow use only for the purpose of the appropriation. An explanation of any significant transfer must be submitted on a regular basis to the interim committee that has program evaluation and monitoring functions for the agency pursuant to Title 5, chapter 5, part 2. An explanation of any transfer that involves a significant change in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee prior to any implementation of the change. If the approving authority certifies that a request for a transfer representing a significant change in agency or program scope, objectives, activities, or expenditures is time-sensitive, the approving authority may approve the transfer prior to the next regularly scheduled meeting of the legislative finance committee. The approving authority shall submit all proposed time-sensitive changes to the legislative fiscal analyst prior to approval. If the legislative fiscal analyst determines that notification of the legislative finance committee is warranted, the legislative fiscal analyst shall immediately notify as many members as possible of the proposed change and communicate any concerns expressed to the approving authority. The approving authority shall present a report fully explaining the reasons for the action to the next meeting of the legislative finance committee. All program transfers must be completed within the same fund from which the transfer originated. A request for a transfer accompanied by a justification explaining the reason for the transfer must be submitted by

the requesting agency to the approving authority and the office of budget and program planning. Upon approval of the transfer in writing, the approving authority shall inform the legislative fiscal analyst of the approved transfer and the justification for the transfer. If money appropriated for a fiscal year is transferred to another fiscal year, the money may not be retransferred, except that money remaining from projected costs for spring fires estimated in the last quarter of the first year of a biennium may be retransferred.

(2) For the purposes of subsection (1), an agency or program is considered to have a significant change in its scope, objectives, activities, or expenditures if:

(a) the budget transfer exceeds \$1 million; or

(b) the budget transfer exceeds 25% of a program's total operating plan and the transfer is greater than \$25,000. If there have been other transfers to or from the program in the current fiscal year, all the transfers, including the transfer under consideration, must be used in determining the 25% and \$25,000 threshold.

History: En. Sec. 9, Ch. 787, L. 1991; amd. Sec. 14, Ch. 347, L. 1997; amd. Sec. 1, Ch. 6, L. 1999; amd. Sec. 3, Ch. 255, L. 2001; amd. Sec. 6, Ch. 569, L. 2001; amd. Sec. 2, Ch. 58, L. 2005.

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