



Montana Legislative Services Division
Legal Services Office

To: Legislative Finance Committee

From: Julie Johnson*

Re: Use of Restrictive and Conditional Language in House Bill 2 to Effectuate Intent

Date: June 2, 2014

Introduction

I have been asked to prepare a brief memo to address some key legal concepts regarding the use of conditional and restrictive language in House Bill No. 2 in order to effectuate legislative intent and to provide some examples of what *should* work and what has not worked in the past.

Key Legal Considerations

- In no event does a condition or limitation contained in an appropriation act amend any other statute. 17-8-0103(2), MCA.
- The "legislature cannot do indirectly through the means of a line items appropriation and conditions what it is impermissible for it to do directly." Board of Regents v. Judge, 168 Mont. 433, 450, 543 P.2d 1323, 1333 (1975).
- The legislature has the power to attach a condition to an appropriation as long as the condition is germane to the purpose of the appropriation and does not infringe on the constitutional powers of the Governor. See Board of Regents v. Judge, 168 Mont. 433 at 451, 543 P.2d at 1333.
- The language in the condition must be tied to a specific identifiable appropriation line item using verbatim language. See Cobb v. Schweitzer, 2006 Mont. Distr. LEXIS 257 (2006).
- The Governor may veto items in appropriation bills, and in such instances the procedure shall be the same as upon veto of an entire bill. Art. VI, sec. 10, Mont. Const.
- The Governor may veto: (1) a specific appropriation contained in the bill, (2) a condition that limited the use to which an appropriation may be put, but only if the appropriation to which it is attached is vetoed as well, and (3) a rider. Cobb v. Schweitzer, ¶ 1.
- A "rider" is "an unrelated piece of legislation incorporated into the appropriation bill". Cobb v. Schweitzer, ¶ 1.

Examples of What *Should* Work and What to Avoid

Below are some examples of where a restriction or condition has been successfully used to effectuate legislative intent as well as some examples where the language was not sufficient to ensure the legislative intention was followed.

1. Identify the Funding as a Line Item and make the Condition Explicit that it is Tied to that Particular Funding.

Example

HB 2 (2011) contained an appropriation of \$80,501 that was labeled "Medical Marijuana Program Staffing". The Legislature desired to restrict this appropriation to pay for staff, so the condition properly referenced the precise line item name. The condition was drafted as follows: "Funding for Medical Marijuana Program Staffing may only be used by the Quality Assurance Division to pay staff to administer the medical marijuana registry." By specifically mentioning Medical Marijuana Program Staffing in the condition it is clear that a veto of the language must be tied to the \$80,501 appropriation.

2. Make Funding Contingent upon Passage of a Bill, and Identify the Bill in HB 2. If the Bill does not get Passed, the Funding Disappears.

Example

HB 2 (2013) contained the following condition:

Division of Criminal Investigation includes \$387,811 in state special revenue in fiscal year 2014 and \$377,162 in state special revenue in fiscal year 2015 that is contingent upon passage and approval of House Bill No. 218 in a form that allows a direct appropriation of the oil and gas impact account for the purpose of funding costs of criminal investigators in the Bakken energy development impacted area of the state. If House Bill No. 218 is not passed and approved in a form that allows a direct appropriation of the oil and gas impact account for this purpose, state special revenue in Division of Criminal Investigation is reduced by \$387,811 in fiscal year 2014 and by \$377,162 in fiscal year 2015.

In this case, HB 218 was vetoed and the funding for the division was reduced accordingly.

3. To Mandate the Use of Funds for a New Program, Enact the Program through another Bill and Provide Funding for the Program Either in that Bill or HB 2.

Example

HB 2 (2013) provided funds to the Department of Revenue to conduct a review of active exempt property records. The Governor vetoed this funding, stating that the legislature had not passed a

bill to conduct the review. Had the legislature passed a bill to conduct the review, the Governor may have vetoed that bill as well, however, if the legislature is setting up a new program, it is best to set it up outside of HB 2 and make the funding of it contingent upon the passage of that bill.

4. **Make Clear how Condition is Related to the Appropriation, and NOT a rider.**

Remember, a "rider" is "an unrelated piece of legislation incorporated into the appropriation bill". Whether an item in an appropriation bill is a rider or not may depend on whether the Governor likes the conditional language or not. Make sure the language is directly related to the bill and does not conflict with a statute. If it conflicts with a statute, the statute must be amended in a "single subject" bill, and not in the appropriation bill.

5. **Reporting Measures to Determine Whether Intent was Followed**

Reporting Requirements in HB 2 have on occasion been vetoed by the Governor as a rider. Courts have also concluded that some reporting requirements to legislative committees are an additional legal duty on a department that go beyond complying with the purpose of the appropriation. Cobb. The exception to this rule is when the appropriation relates to a study.

If a reporting requirement is contemplated:

- (1) it should be clear that part of the funding is to be utilized for reporting to the legislative committee (best as a line item, even though perhaps more vulnerable to a veto);
- (2) the reporting must take place during the same timeframe as the accompanying appropriation;
- (3) reporting cannot conflict with substantive law; and
- (4) the report must relate to a specific identifiable appropriation line item.

6. **Remember HB 2 is Not the Only Bill that Can be Considered a "General Appropriations Act".**

Other reserved House Bills, generally HB Nos. 1-15, such as HB 5 (long range building program), HB 15 (quality schools facility grant program), have been considered by the executive as appropriation bills and should not contain statutory amendments. Even if the statute deals explicitly with the type of funding in the bill, it is best to have the statutory amendment in a separate bill.

Example

In 2013, the legislature sought to amend HB 15, which provides funds for the quality schools facility grant program, to include a statutory changes to the priority of funding for the

program. While the statutory amendment was related to the program, the Governor considered the statutory amendments as riders and struck the changes. Had the statutory changes been in a "single subject" bill, the funding in HB 15 could have been contingent upon the passage of the other bill to effectuate the legislature's intent.

7. **Funding is Restricted but not Conditioned Upon Passage of Another Bill Mandating the use of the Funding as Intended.**

Example of What Has Not Worked

House Bill 2 (2013) had restrictive language providing that certain funding had to be used to raise provider rates. House Bill 625, which mandated a 2% increase to providers "who contract with the department using the base rate for fiscal year 2012" was vetoed. However, the funding in HB 2 was not explicitly conditioned upon the passage of HB 625.

HB 2 Restrictive Language:

The department of public health and human services must use the following amounts of money in the following appropriations to raise medicaid provider rates, except those medicaid services funded by the federal children's health insurance grant, by 2% in fiscal year 2014 and by 2% in fiscal year 2015:

- (1) Medicaid Services --Developmental Services, \$3,755,335 in fiscal year 2014 and \$7,585,778 in fiscal year 2015;
- (2) Medicaid Services --Health Resources, \$4,650,249 in fiscal year 2014 and \$9,389,047 in fiscal year 2015;
- (3) Medicaid Services Senior and Long-Term Care, \$4,392,560 in fiscal year 2014 and \$8,872,971 in fiscal year 2015; and
- (4) Medicaid Services --Addictive and Mental Disorders, \$1,097,758 in fiscal year 2014 and \$2,217,499 in fiscal year 2015.

Remember, HB 2 cannot mandate the use of funding. Instead of "must", "may only" should have been used. Had this language been conditioned up passage of HB 625, the veto of HB 625 would have removed the funds from HB 2. In this case, the department did give increases to some providers, but not at an exact 2% rate.