VOLUME NO. 51 OPINION NO. 4

APPROPRIATIONS - Effect of legislation prospectively limiting spending by future legislatures;
LEGISLATIVE BILLS - Effect of legislation requiring supermajority for future legislative action;
LEGISLATURE - Effect of legislation prospectively limiting spending by future legislatures;
STATUTORY CONSTRUCTION - Propriety of repeal by implication of statutory spending limitation by actions of future legislature;
MONTANA CODE ANNOTATED - Sections 15-38-203(2) (1989), 17-8-106 (2003);
MONTANA CONSTITUTION - Article V, sections 1, 11, (5), 13, 23; article VI, section 10(4); article VIII, sections 6(2), 8, 9, 13; article IX, section 5;
REVISED CODES OF MONTANA, 1947 - Sections 11-1825, -1834.

HELD: The enactment of Mont. Code Ann. § 17-8-106 by the 1981 legislature placed no enforceable limits on the spending power of a subsequent legislature.

July 5, 2005

Mr. Douglas A. Kaercher
Hill County Commissioner
315 Fourth Street
Havre, MT 59501

Dear Mr. Kaercher:

You have requested my opinion on questions regarding the application of Mont. Code Ann. § 17-8-106. That statute, enacted in 1981, purports to limit the power of subsequent legislatures to appropriate funds by establishing a "cap" on expenditures in the 1981 budget biennium and for any future biennial budget cycles. The statute provides as follows:

> **Expenditure limitation -- exception.** (1) Except as provided in subsection (2), the state expenditures for a biennium may not exceed the state

Local Government Subcommittee
October 6, 2005

Exhibit #7

> expenditures for the preceding biennium plus the product of the state expenditures for the preceding biennium and the growth percentage. The growth percentage is the percentage difference between the average Montana total personal income for the 3 calendar years immediately preceding the next biennium and the average Montana total personal income for the 3 calendar years immediately preceding the current biennium.
>
> (2) The legislature may appropriate funds in excess of this limit from the reserve account if:
>
> (a) the governor declares that an emergency exists; and
>
> (b) two-thirds of the members of each house approve a bill stating the amount to be spent in excess of the expenditures limitation established in subsection (1), the source of the excess revenue to be spent, and an intention to exceed the limitation.
>
> (3) Expenditures may exceed the expenditures limitation only for the year or years for which an emergency has been declared.
>
> (4) The legislature is not required to appropriate the full amount allowed in any year under subsection (1).

Any questions regarding the application of the "cap" are subservient to the controlling issue of whether this statute constitutes an enforceable limitation on the amount that a subsequent legislature may appropriate. For the reasons that follow, it is my opinion that the 1981 statute cannot, consistent with the Montana Constitution, act as a control over the appropriation power of any subsequent legislative assemblies.

The Montana Constitution vests the legislative power in the legislature consisting of the House of Representatives and Senate, and in the people through the power of initiative and referendum. Mont. Const. art. V, § 1. It provides further that the legislature may enact laws only by bill passed by vote of a majority of all members present and voting. Mont. Const. art. V, § 11. The constitution contains other provisions requiring a supermajority vote on specific kinds of legislative action. See, e.g., art. V, § 13 (requiring 2/3 vote of the House to bring bill of impeachment and 2/3 vote to convict); art. VI, § 10(4) (requiring 2/3 vote to override veto); art. VIII, § 6(2) (allowing appropriation of revenue from GVW fees and fuel taxes for general purposes only by 3/5 vote); art. VIII, § 8 (requiring 2/3 vote to create state debt); art. IX, § 5 (requiring 3/4 vote to appropriate principal of coal severance tax trust fund.) However, two fundamental principles are clear. First, the power of the legislature to set state expenditure levels is explicitly recognized in article VIII, sections 9 and 13 of the Montana Constitution. The legislature's constitutional spending power is plenary, subject only to those limitations placed upon it in the Constitution. See, e.g., Mont. Const. art. V,

§ 11(5) (prohibiting appropriations for private religious and charitable purposes to private individuals). Second, it is fundamental that in matters not subject to specific constitutional requirements to the contrary, a bill passed by simple majority vote of each house and signed by the governor becomes law.

Consistent with this constitutional design, the legislature lacks the power to pass a law that purports to establish binding legislative spending policy for future legislatures. In Butte-Silver Bow Local Gov't v. State, 235 Mont. 398, 768 P.2d 327 (1989), the Montana Supreme Court applied this rule with respect to the administration of the Resource Indemnity Trust Tax. The issue was whether it was appropriate to expend funds from the Resource Indemnity Trust Fund for certain ongoing expenses of natural resource agencies. The local government argued that the expenses were inappropriate, relying in part on the provision of Mont. Code Ann. § 15-38-203(2) (1989) that "It is the intention of the legislature that future appropriations from the resource indemnity trust interest account not be made to fund general operating expenses of state agencies." The Court rejected the allegation that the expenditures violated the statute, stating: "[T]he Legislature generally cannot pass legislation which a future Legislature may not repeal." 235 Mont. at 406. The only exception to this rule that the Court has recognized is that a future legislature may not disavow a binding contractual obligation previously entered by the State, State ex rel. Diederichs v. State Highway Comm'n, 89 Mont. 205, 215, 296 P. 1033, 1036-37 (1931), an exception not relevant to the present question.

The view expressed by the Court in Butte-Silver Bow is consistent with the general rule followed in many other jurisdictions. For example, in Patterson v. Dempsey, 152 Conn. 431, 207 A.2d 739 (1965), the Connecticut Supreme Court considered the effect of a statute which purported to prohibit a future legislature from passing an appropriation bill containing non-appropriation substantive law provisions. The Court held the limitation ineffective, finding that the inclusion of the non-appropriation matters in the subsequent appropriation bill "was the equivalent of an affirmative enactment suspending, to the extent that the action violated [the prior statute], the prohibitory part of [the prior act]." 207 A.2d at 745. The court explained its decision as follows:

> The effect is really that of repeal by implication. "When expressions of the legislative will are irreconcilable, the latest prevails." To hold otherwise would be to hold that one General Assembly could effectively control the enactment of legislation by a subsequent General Assembly. This obviously is not true, except where vested rights, protected by the constitution, have accrued under the earlier act.

Id., quoting Moran v. Bens, 144 Conn. 27, 30, 127 A.2d 42, 44 (1956). See also, e.g., Straughn v. Camp, 293 So. 2d 689, 694 (Fla. 1974) (tax exemption granted by the Florida legislature for certain county property did not establish tax policy that a subsequent legislative session could not change, stating "It is well established that one legislature cannot bind its successors with respect to the exercise of the taxing power . . . ."); Board of Education v. Bremen Township Rural Independent School Dist., 260 Iowa 400, 148 N.W.2d 419, 424 (1967) (school board could not by resolution limit power of subsequent board to modify district boundaries, stating "one legislature cannot bind future legislatures upon such policy matters."); Opinion to the Governor, 97 R.I. 200, 196 A.2d 829, 832 (1964) (Legislature could not include provision in bill limiting ability of future legislature to fund operation of public bridge through certain level of debt where amount of state debt was within legislative power of subsequent legislatures).

It has been suggested that repeals by implication through exercise of the spending power are not favored, relying on certain language in the Montana Supreme Court's decision in City of Helena v. Omholt, 155 Mont. 212, 468 P.2d 764 (1970). Such reliance is, in my opinion, misplaced. Omholt considered substantive statutes, Rev. Codes Mont. 1947 §§ 11-1825 and 11-1834, requiring the State Auditor to pay over to cities a certain amount of money for deposit into the local police officer reserve fund. In 1967, the legislature passed an appropriation bill known as HB 577 that, in addition to authorizing certain spending, contained substantive language that changed the amount that the Auditor was required to remit to the cities. The Court's holding was that the substantive provision of HB 577 was invalid because the substantive change was not expressed in the title of the bill as required by article V, section 23 of the Montana Constitution, which limited bills to one subject clearly expressed in the title and voided any provision of a bill not so expressed.

The opinion in Omholt does contain dicta suggesting that appropriation bills should not be held to amend substantive law by implication, 155 Mont. at 222. However, the Court expressly declined to base the holding in the case on any analysis of the repeal by implication doctrine, 155 Mont. at 218 ("We need not discuss whether the provisions of the appropriation bill irreconcilably conflict with section 11-1825 and section 11-1834 and repeal the latter statutes by implication.") The Supreme Court's holding in a case consists only of those legal conclusions necessary to reach its judgment; any other legal discussion is non-binding obiter dicta. State ex rel. McVay v. District Court, 126 Mont. 382, 396, 251 P.2d 840, 847-48 (1953); see also Spoklie v. Montana Dep't of Fish, Wildlife, & Parks, 2002 MT 228, ¶ 32, 311 Mont. 427, 436, 56 P.3d 349, 355 (rejecting unnecessary dicta in prior opinion). The language from Omholt criticizing repeals by implication in appropriation statutes was not part of the Court's resolution of the case, and it therefore is not binding legal authority.

Omholt is also distinguishable on its facts. In that case, the legislature had passed substantive legislation creating a ministerial duty on the part of the Auditor to make certain payments to the city. The repeal by implication argument thus revolved around whether the legislature could change through an appropriation measure a statute creating a duty on an executive branch officer. It did not deal with the question we have here, which is whether the legislature can enact a statute that purports to limit ***its own*** constitutional power to enact spending legislation in the future.

The general rule with respect to repeals by implication is that the intention of the legislature in passing the subsequent legislation controls. State ex rel. Jenkins v. Carisch Theatres, Inc., 172 Mont. 453, 458, 564 P.2d 1316, 1319 (1977) (the key to determining whether a later act repeals a former by implication "is the legislative intent in passing the subsequent act.") Whatever rule may be appropriate in the context of general statutes such as those in Omholt addressing the duties of executive branch officials, where, as here, the former statute purports to be an express limit on the lawmaking power of subsequent legislatures, action by the subsequent legislature ignoring the purported restriction in the prior act constitutes a clear indication of the legislature's intent not to be bound by the prior policy.

Under our constitution each legislative assembly is vested with the full legislative power of the state with respect to all matters that are constitutionally the subject of legislative power. There is no cap on state spending in the Montana constitution.

The authority of the 1981 legislature to set spending policy for the State ended when the 1983 legislature was seated. From that point forward, no general proscription by the 1981 legislature of spending above the amount provided by the formula set in Mont. Code Ann. § 17-8-106 could have any effect as an enforceable limit on the power of each subsequent legislative assembly to adopt a budget and appropriate state money. Nor could the 1981 legislature create a requirement that spending above a certain limit would be impermissible absent a declaration of an emergency and a supermajority vote of a subsequent legislature.

As with the prohibition of non-appropriation provisions in an appropriation bill considered by the Connecticut court in Patterson, the attempt to graft legislative limits on the exercise of the appropriation power by subsequent legislatures is ineffective if the subsequent legislature chooses to adopt conflicting legislation. As noted above, the constitution establishes that, except as otherwise specifically provided in the constitution, a law is enacted by majority vote of both houses of the legislature. Mont. Const. art. V, § 11. The 1981 legislature could not add to the constitution's list of enactments requiring a supermajority by the simple expedient of passing a law by majority vote.

Since it is my opinion that the so-called "budget cap" is of no force and effect as a limit on the appropriation power of a subsequent legislative assembly, it is not necessary to consider your specific question regarding the application of Mont. Code Ann. § 17-8-106 to specific spending proposals.

THEREFORE, IT IS MY OPINION:

> The enactment of Mont. Code Ann. § 17-8-106 by the 1981 legislature placed no enforceable limits on the spending power of a subsequent legislature.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cdt/jym