



April 15, 2020

**TO: Legislative Council**

**FR: Todd Everts, Chief Legal Counsel and Code Commissioner**

**RE: Legal Overview of Executive Branch and Legislative Branch Emergency Powers**

The purpose of this memorandum is to provide a legal overview of Executive Branch and Legislative Branch emergency and continuity of government powers that may be applicable during the COVID-19 National and State declared emergencies. Specifically, this memorandum will address:

1. Executive Branch constitutional and statutory emergency powers.
2. Legislative Branch constitutional and statutory emergency powers.

## **I. EXECUTIVE BRANCH CONSTITUTIONAL AND STATUTORY EMERGENCY POWERS**

### **A. State Emergency and Disaster Declarations and State Executive Directives -- Authority Cited**

On March 12, 2020, Governor Bullock issued [Executive Order No. 2-2020](#), in which he declared a state of emergency to exist within the State of Montana related to the communicable disease COVID-19 Novel Coronavirus. On March 13, 2020, President Trump declared a [National Emergency](#) concerning the COVID-19 outbreak and the Governor also issued [Executive Order No. 3-2020](#) amending Executive Order 2-2020, providing that the state of emergency declared in Montana runs concurrently with the President's emergency declaration. On March 31, 2020, Montana's request for a [major disaster declaration](#) for COVID-19 response was approved by the federal government. Between March 15, 2020, and April 13, 2020, the Governor has issued twenty-two [executive directives](#).

The Governor has generally cited the following authority for issuing the declaration of a state of emergency and executive directives:

1. [Art. VI, Section 4, Mont. Const.](#)
2. [Art. VI, Section 13, Mont. Const.](#)
3. [10-3-103](#)
4. [10-3-104](#)
5. [10-3-118](#)
6. [10-3-302](#)
7. [10-3-305](#)

8. [10-3-311](#)
9. [10-3-313](#)
10. [10-3-405](#)
11. [50-1-101](#)
12. [50-1-103](#)
13. [50-1-202](#)
14. [50-1-203](#)
15. [50-1-204](#)
16. [61-10-111](#)
17. [61-10-154](#)
18. [37 A.G. Op. 132 \(1978\)](#)
19. All other applicable provisions of state and federal law.

## **B. Executive Branch Constitutional Emergency Power Provisions**

Article VI, Section 4(1), of the Montana Constitution provides that the executive power is vested in the Governor and that the Governor has other duties as provided in the constitution and by law:

**Section 4. Duties.** (1) The executive power is vested in the governor who shall see that the laws are faithfully executed. He shall have such other duties as are provided in this constitution and by law.

The Montana Supreme Court has opined that the constitution and laws of the state are the charters of the Governor's powers, and in them the Governor must find the authority for the Governor's official acts. *Herlihy v. Donohue*, 52 M 601, 161 P 164 (1916).

Article VI, Section 13, of the Montana Constitution provides:

**Section 13. Militia.** (1) The governor is commander-in-chief of the militia forces of the state, except when they are in the actual service of the United States. He may call out any part or all of the forces to aid in the execution of the laws, suppress insurrection, repel invasion, ***or protect life and property in natural disasters. (emphasis added)***

(2) The militia forces shall consist of all able-bodied citizens of the state except those exempted by law.

In order to implement the foregoing constitutional provisions concerning the Governor's authority, the Legislature over time has enacted [Title 10, MCA](#), regarding military affairs and disaster and emergency services and [Title 50, MCA](#), regarding health and safety.

As this memorandum reflects, the Legislature has delegated a great deal of authority and flexibility to the Executive Branch in order to allow the state to respond to emergencies and disasters in a timely and effective manner.

### **C. Overview of States of Emergency and Disaster Declarations – Timeframe**

Section [10-3-103\(8\)](#), MCA, defines an emergency as follows:

"Emergency" means the imminent threat of a disaster causing immediate peril to life or property that timely action can avert or minimize.

Section [10-3-103\(4\)](#), MCA, defines a disaster as follows:

"Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or artificial cause, including tornadoes, windstorms, snowstorms, wind-driven water, high water, floods, wave action, earthquakes, landslides, mudslides, volcanic action, fires, explosions, air or water contamination requiring emergency action to avert danger or damage, blight, droughts, infestations, riots, sabotage, hostile military or paramilitary action, disruption of state services, accidents involving radiation byproducts or other hazardous materials, outbreak of disease, bioterrorism, or incidents involving weapons of mass destruction.

Section [10-3-302](#), MCA, provides that the Governor may declare a state of emergency. A state of emergency may not continue longer than 30 days unless continuing conditions of the state of emergency exist. The determination of continuing conditions must be based upon a declaration of an emergency by the President of the United States or by a legislative declaration by joint resolution. The Governor declared a state of emergency related to COVID-19 to be effective on March 12, 2020. On March 13, 2020, President Trump issued a proclamation declaring a national emergency. It states: "the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020." Consequently, the state of emergency does not terminate after 30 days.

Section [10-3-303](#), MCA, provides that the Governor may declare a state of disaster. A state of disaster may not continue longer than 45 days unless continuing conditions of the state of disaster exist. The determination of continuing conditions must be based upon a declaration of a disaster by the President of the United States or by a legislative declaration by joint resolution.

### **D. Executive Power to Suspend Statutes, Direct and Compel Evacuation, and Control Movement**

The Governor is vested with broad powers in section [10-3-104](#), MCA, which delegates certain responsibility and authority to the Governor with respect to disasters and emergencies. Pursuant to section [10-3-104\(2\)](#), MCA, the Governor may:

(a) suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if

the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster;

(b) direct and compel the evacuation of all or part of the population from an emergency or disaster area within the state if the governor considers this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(c) control ingress and egress to and from an incident or emergency or disaster area, the movement of persons within the area, and the occupancy of premises within the area.

The governor may issue executive orders, proclamations, and regulations and amend and rescind them. All executive orders or proclamations declaring or terminating a state of emergency or disaster must indicate the nature of the emergency or disaster, the area threatened, and the conditions that have brought about the declaration or that make possible termination of the state of emergency or disaster ([10-3-104](#), MCA).

Section [10-3-305](#), MCA, provides that the Governor is the commander-in-chief of the militia and all other forces available for incident, emergency, or disaster duty. The Governor is directed to delegate authority pursuant to the state disaster and emergency plan provided for in section [10-3-301](#), MCA.

The Governor through the Department of Public Health and Human Services (DPHHS) also has very broad duties to address an emergency involving an outbreak of disease under section [50-1-202](#), MCA. These include the duty to:

- disseminate information and make recommendations for control of diseases and other conditions of public health importance;
- at the request of the Governor, accept funds for and administer any federal health program for which responsibilities are delegated to states;
- identify, assess, prevent, and mitigate conditions of public health importance through
  - screening and testing programs;
  - isolation and quarantine measures;
  - treatment;
  - collecting and maintaining health information; or
  - other public health measures as allowed by law.

Section [50-1-101](#), MCA, defines key terms with respect to DPHHS's authority related to the COVID-19 emergency declaration and directives:

**"Communicable disease"** means an illness because of a specific infectious agent or its toxic products that arises through transmission of that agent or its products from an infected person, animal, or inanimate reservoir to a susceptible host. The transmission may occur either

directly or indirectly through an intermediate plant or animal host, a transmitting entity, or the inanimate environment.

**"Condition of public health importance"** means a disease, injury, or other condition that is identifiable on an individual or community level and that can reasonably be expected to lead to adverse health effects in the community.

**"Isolation"** means the physical separation and confinement of an individual or groups of individuals who are infected or reasonably believed to be infected with a communicable disease or possibly communicable disease from nonisolated individuals to prevent or limit the transmission of the communicable disease to nonisolated individuals.

**"Public health services and functions"** means those services and functions necessary to promote the conditions in which the population can be healthy and safe, including:

(a) population-based or individual efforts primarily aimed at the prevention of injury, disease, or premature mortality; or

(b) the promotion of health in the community, such as assessing the health needs and status of the community through public health surveillance and epidemiological research, developing public health policy, and responding to public health needs and emergencies.

**"Quarantine"** means the physical separation and confinement of an individual or groups of individuals who are or may have been exposed to a communicable disease or possibly communicable disease and who do not show signs or symptoms of a communicable disease from nonquarantined individuals to prevent or limit the transmission of the communicable disease to nonquarantined individuals.

**"Screening"** means diagnostic or investigative analysis or medical procedures that determine the presence or absence of or exposure to a condition of public health importance or the condition's precursor in an individual.

**"Testing"** has the same meaning as screening.

Pursuant to section [50-1-204](#), MCA, DPHHS may adopt and enforce quarantine or isolation measures to prevent the spread of communicable disease.

DPHHS is also required under section [50-1-202](#), MCA, to provide consultation to school and local public health personnel, to consult with the Superintendent of Public Instruction on conditions of public health importance for schools, and to provide consultation to local boards of health.

## **E. Executive Power to Incur Expenses**

### ***Executive Authority to Incur Liabilities on Behalf of State***

Section [10-3-311\(1\)](#), MCA, provides that:

(1) The governor may authorize the incurring of liabilities and expenses to be paid as other claims against the state from the general fund, in the amount necessary, when an emergency or disaster justifies the expenditure and is declared by the governor, to meet contingencies and needs arising from an emergency or disaster, as defined in [10-3-103](#),

that results in damage to the works, buildings, or property of the state, any political subdivision of the state, or a tribal government or that menaces the health, welfare, safety, lives, or property of any considerable number of persons in any county or community of the state, including an Indian reservation, upon demonstration by the political jurisdiction, including a tribal government, that:

- (a) the political jurisdiction has exhausted all available emergency levies;
- (b) the emergency is beyond the financial capability of the political jurisdiction to respond and for which no appropriation in the affected fund is available in a sufficient amount to meet the emergency or disaster; or
- (c) federal funds available for the emergency or disaster require either matching state funds or specific expenditures prior to eligibility for assistance under federal laws.

Section [10-3-311](#), MCA, has been construed in two Attorney General Opinions. In 39 A.G. Op. 33 (1981), Attorney General Greely determined that expenses incurred in the mobilization of the Montana National Guard when the Guard is mobilized pursuant to a declaration of emergency under section [10-3-311](#), MCA, are funded through section [10-3-312](#), MCA. General Greely also noted that some instances, such as the strike against the Department of Institutions in 1979, could justify the mobilization of the Guard, but that a declaration of an emergency under section [10-3-302](#), MCA, might be inappropriate.

In 42 A.G. Op. 123 (1988), General Greely determined that the authority of the Governor to "incur" expenses under section [10-3-311](#), MCA, is distinct from the statutory appropriation found in section [10-3-312](#), MCA. Although the budget amendment process was inapplicable to a request by the Department of State Lands (now the Department of Natural Resources and Conservation) to pay the costs associated with the suppression of forest fires, the Legislature may be bound by section [10-3-311](#), MCA, to appropriate money from the general fund to cover valid COVID-19 expenses.

#### **F. Executive Authorization to Spend General Fund Money -- Statutory Appropriation of Federal Money -- Federal CARES Act**

There are three separate appropriation methods available to deal with the costs of an emergency or disaster that are provided for in sections [10-3-203](#), [10-3-312](#), and [10-3-313\(3\)](#), MCA.

##### ***(1) Emergency Spending Statutory Appropriations***

Section [10-3-312](#), MCA, provides that an amount not to exceed \$16 million is statutorily appropriated to the office of the Governor in any biennium for the purpose of meeting emergencies or disasters. The statutory appropriation may be used by any state agency designated by the Governor. If money expended under section [10-3-312](#), MCA, is recovered, the spending authority is reinstated to a level reflecting the recovery. If a disaster is declared by the President of the United States, an additional \$500,000 from the general fund is statutorily appropriated for each biennium for the state share of federal individual and households grant

programs. In 42 A.G. Op. 123 (1988), General Greely also determined that a disaster or emergency must be declared by the Governor before expenses may be incurred under section [10-3-312](#), MCA. If a disaster is declared by the Governor, the statutory appropriation provided for in section [10-3-312](#), MCA, is not required to be expended before any other funds may be used for expenses associated with the disaster. The opinion also held that the budget amendment process was not intended to permit a general fund loan when the only anticipated revenue for repayment was the possibility of a subsequent appropriation of money from the general fund.

***(2) Statutory Appropriation of Emergency Federal Funds -- CARE Act***

Section [10-3-203](#), MCA, governs the use of emergency funds received from the federal government and provides as follows:

**Acceptance of services, gifts, grants, and loans.** (1) Whenever the federal government or any agency or officer of the federal government offers to the state . . . funds . . . for purposes of emergency or disaster services, the state, acting through the governor . . . may accept the offer. Upon the acceptance, the governor of the state . . . may authorize any officer of the state . . . to receive the . . . funds on behalf of the state . . . and subject to the terms of the offer and the rules, if any, of the agency making the offer.

(2) The funds . . . set forth in subsection (1) are statutorily appropriated, as provided in [17-7-502](#), to the governor for the purposes set forth in subsection (1)[.]

Consequently, section [10-3-203](#), MCA, authorizes the Governor to accept the funds received under the federal "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act," and they are statutorily appropriated pursuant to section [17-7-502](#), MCA. The funds may only be used for the purposes specified in Section 601(d) of the CARES Act.

Section 601(d) of the CARES Act governs the use of funds and provides as follows:

A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);

(2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

Therefore, funds received by the State of Montana under Section 601 of the CARES Act may only be used for necessary expenditures incurred due to the public health emergency. The funds cannot be used in place of funds that were appropriated by the Legislature in the 2019 Session. Finally, the funds must be used for expenses incurred between March 1, 2020, and the end of the

calendar year. If it is later determined that a state has failed to comply with 601(d), an amount equal to the amount of funds used in violation will be booked as a debt of the state owed to the federal government. Section 601(f)(2). Because section [10-3-203](#), MCA, authorizes that funds received under the CARES Act are statutorily appropriated, no legislative action is required to appropriate those funds.

### ***(3) Executive Branch Application for Funding***

Section [10-3-313](#)(3), MCA, provides that nothing in Title 10, chapter 3, parts 1 through 4, MCA, may be construed to limit the Governor's authority to apply for, administer, and expend any grants, gifts, or payments in aid of emergency or disaster prevention, preparedness, response, or recovery. Funds accepted pursuant to section [10-3-313](#)(3), MCA, could be appropriated by a budget amendment.

## **II. LEGISLATIVE BRANCH CONSTITUTIONAL AND STATUTORY EMERGENCY POWERS**

### **A. Legislative Branch Constitutional Emergency Power Provisions**

#### **1. Legislative Power of Enactment**

Article V, Section 1, of the Montana Constitution provides that the fundamental legislative power to enact law is vested in the Legislature:

**Section 1. Power and structure.** The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

The Legislature has exercised its constitutional legislative power to address public health emergencies and disasters through the enactment of [Title 10](#), and [Title 50](#), MCA.

#### **2. Legislative Continuity of Government Powers**

Article III, Section 2, of the Montana Constitution provides the Legislature with the power to ensure that the continuity of government is maintained during periods of emergency resulting from disasters or enemy attack:

**Section 2. Continuity of government.** The seat of government shall be in Helena, except during periods of emergency resulting from disasters or enemy attack. The legislature may enact laws to insure the continuity of government during a period of emergency without regard for other provisions of the constitution. They shall be effective only during the period of emergency that affects a particular office or governmental operation.

This provision provides the Legislature with the power to enact laws ensuring continuity of government during a period of emergency "without regard for other provisions of the constitution." Those laws regarding continuity of government are only effective during the period of emergency that affects a particular office or governmental operation.

The condition precedent that likely triggers the legislative powers under this provision is that continuity of government for a particular office or governmental operation is impacted by a disaster or enemy attack and continuity has broken down or been eliminated.

There was little substantive discussion in the Constitutional Convention transcripts regarding Article III, Section 2, of the Montana Constitution. There is also very little, if any, applicable Montana case law regarding this constitutional provision.

There is a 1935 Montana Supreme Court case that involves a declaration of emergency by the Legislature that explores the emergency powers of the Legislature. *St. ex re. Sparling v. Hitsman*, 99 Mont. 521 (1935). The Supreme Court notes:

As we view this case, it is not necessary to decide whether the legislature can, by reason of an emergency alone, legalize a proposition otherwise beyond its power. We may bear in mind, however, the principle declared by the United States Supreme Court in the case of *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 235, 78 L. Ed. 413, 88 A.L.R. 1481, wherein it was said: "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has [\*\*750] never lived, nevertheless emergency [\*\*\*9] may afford a reason for the exertion of a living power already enjoyed.'

The Legislature has implemented the continuity of government constitutional provisions by enacting the "Continuity in Government Act," under [Title 10, chapter 3, part 6](#), MCA.

### **3. Legislative Constitutional Police Powers**

Pursuant to section [2-1-402](#), MCA, the Montana Legislature has declared that:

the 10th amendment to the United States constitution directs that powers that are not delegated to the United States are reserved to the states or to the people. Montana, as one of the sovereign states within the union, has constitutional authority to enact laws protecting the environment of the state and safeguarding the public health, safety, and welfare of the citizens of Montana.

State police powers were reserved in the federal constitution for states' use when needed for the preservation of the common good. When applied, they allow states to pass and enforce public health isolation and quarantine, health, and inspections laws to interrupt or prevent the spread of disease. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). The Montana Supreme Court has

repeatedly recognized that the State of Montana and local governments possess an inherent power to enact reasonable legislation and ordinances for the health, safety, welfare, or morals of the public. *Billings v. Skurdal*, 224 Mont. 84, 730 P.2d 371 (1986); *State v. Rathbone*, 110 Mont. 225, 241, 100 P.2d 86, 92 (1940); *State v. Penny*, 42 Mont. 118, 111 P. 727 (1910); *Betty v. City of Sidney*, 79 Mont. 314, 319, 257 P. 1007, 1009 (1927).

## **B. Termination of Governor's Authority, Role of the Legislature and the Federal Government**

Section [10-3-302](#), MCA, provides that the Governor may declare a state of emergency. A state of emergency may not continue longer than 30 days unless continuing conditions of the state of emergency exist. The determination of continuing conditions must be based upon a declaration of an emergency by the President of the United States or by a legislative declaration by joint resolution. The Governor declared a state of emergency related to COVID-19 to be effective on March 12, 2020. On March 13, 2020, President Trump issued a proclamation declaring a national emergency. It states: "the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020." Consequently, the state of emergency does not terminate after 30 days.

Section [10-3-303](#), MCA, provides that the Governor may declare a state of disaster. A state of disaster may not continue longer than 45 days unless continuing conditions of the state of disaster exist. The determination of continuing conditions must be based upon a declaration of a disaster by the President of the United States or by a legislative declaration by joint resolution.

The Legislature has delegated a great deal of authority and flexibility to the Executive Branch to respond to emergencies and disasters. Absent the need for an additional appropriation of state funds, the sole requirement for legislative action would be the extension of the period of the declaration of an emergency or disaster. The duration of the declaration of an emergency or disaster is a policy choice. Since the President of the United States declared a national emergency related to the outbreak of COVID-19 in the United States, there is no need to legislatively extend the Governor's state of emergency at this time. The legislative extension of the duration of a state of emergency declaration appears to be intended as a check on the power of the Executive Branch.