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Representative Walt McNutt
110 12th Avenue SW
Sidney, Montana 59270

Dear Representative McNutt,

I am writing in response to your request for an analysis of the financial aspects of House Bill No. 52 from the 2009 legislative session. House Bill No. 52 was enacted as Chapter 436, Laws of 2009, and became effective July 1, 2009. House Bill No. 52 was introduced by request of the Water Policy Committee.

House Bill No. 52 directs the Montana Bureau of Mines and Geology to develop and implement a ground water investigation program for the purpose of collecting and compiling ground water and aquifer data. The program is required to gather data, compile existing information, conduct field studies, and prepare a detailed hydrogeologic assessment report for each water subbasin.

The program is also required to develop a monitoring plan and a hydrogeologic model for each subbasin for which a report is prepared. These requirements are of an ongoing nature and are codified as section 85-2-525, MCA, as directed by section 5, Chapter 436, Laws of 2009. The Office of Budget and Program Planning has indicated that the funding for House Bill No. 52 is budgeted on the statewide budgeting and accounting system as "one-time-only" and will not be included in the base budget for the 2011 legislative session.

As introduced, section 3 of House Bill No 52 contained a \$4.2 million appropriation from the state general fund to the Montana Bureau of Mines and Geology for developing and implementing the ground water investigation program. Section 4 of House Bill No. 52, provided that if House Bill No. 2, the general appropriations act, contained an appropriation of at least \$4.2 million for the program, then the appropriation in section 3 of House Bill No. 52 would be void. The House Appropriations Committee reduced the appropriation in section 3 of House Bill No. 52 to \$900,000 and made a corresponding change to the coordination language in section 4 of House Bill No. 52. The bill remained unchanged after the House Appropriations Committee amendments and was sent to the Governor on April 22, 2009. On April 23, 2009, the Governor returned House Bill No. 52 with a recommended amendment increasing the appropriation to \$4.2 million as originally introduced. The Governor's message accompanying the recommended amendment stated that the amendment stated:

House Bill 52 establishes a ground water investigation program under the guidance of the existing ground water assessment steering committee. The information collected through this program will be invaluable in developing plans and models for Montana subbasins that are current, comprehensive,

and accurate to assist the state in planning for agricultural, industrial, and development uses, as well as conservation and ecological protection.

My proposed amendment restores one-time-only funding in the amount of \$4.2 million, as originally requested by the interim Water Policy Committee, for this important mission.

The House of Representatives and the Senate adopted the Governor's recommended amendments, the bill was resent to the Governor, and the Governor signed the bill on May 5, 2009. The House and the Senate do not adopt the message accompanying a recommended amendment, but vote only on the recommended amendment itself. There is nothing in Chapter 436, Laws of 2009, indicating that the program or the funding for the program were intended to be temporary or of a one-time nature. The minutes of the 2007-2008 Water Policy Committee indicate that the Committee intended to have the ground water investigation program be an ongoing program in the Montana Bureau of Mines and Geology and that the funding for the program be included in the Bureau's base budget.

At its August 12, 2008, meeting, the Water Policy Committee discussed LC5007, the discussion draft that became House Bill No. 52, for over an hour. During that discussion, Representative Cohenour asked whether the Committee needed to request funding for the proposed program from the Governor's Office. Committee staff responded that a specific appropriation for the program was included in the discussion draft. After further discussion, Representative Cohenour recalled that the Committee had decided not to pursue funding through the Montana University System and would request funding from the Governor's budget. Representative Cohenour urged the Committee to act on the proposal. Representative Boggio requested that the Governor's Office of Budget and Program Planning be contacted to determine whether the Governor would support a statewide hydrogeological study and whether funding would be available. Senator Perry then discussed the importance of the hydrological study and stated that he supported the idea. Senator Perry stated it was important for the Committee to effectively convey the idea to the Legislature in January. Senator Perry cautioned against going too far with the funding request and suggested being conservative because of the unknown budgetary restraints. Chairman Elliott then asked whether there would be a statutory appropriation for the proposed program, to which I responded that the program would become a statutory duty of the Montana Bureau of Mines and Geology and would become part of the base budget for the Bureau. Chairman Elliott addressed the draft contingent voidness provision and wondered whether the appropriation would become part of the base budget if the appropriation is contained in House Bill No. 2. I stated that it would. Later in that meeting, Representative Cohenour stated that the proposed \$1.2 million appropriation should stay in the draft legislation and suggested formally contacting the Governor's Office with regard to the level of funding.

At its September 11, 2008, meeting, the Water Policy Committee again discussed potential funding sources for the ground water study program. Amy Carlson, Assistant Budget Director for the Governor's Office of Budget and Program Planning, stated that her office would continue to evaluate the Committee's issues and policy recommendations. Representative Cohenour asked what Committee proposals the Governor's Office was

interested in. Ms. Carlson stated that she could not say what the level of funding would be, but that the Governor was interested in the statewide hydrogeological survey. Later that day, Representative Cohenour moved to approve LC5007 as a Committee bill and moved to amend LC5007 to include the appropriate amount of money needed to address the seven basins in the high-growth areas. The amendment was adopted, and the Committee voted unanimously to formally request a Committee bill draft.

There is nothing in the Committee minutes to indicate that the Committee intended the funding for the ground water investigation program to be "one-time-only" and therefore excluded from the Montana Bureau of Mines and Geology's base budget. In fact, the Committee discussions indicate a contrary intent. Therefore, the statement in the Governor's amendatory veto message concerning restoring "one-time-only funding in the amount of \$4.2 million, as originally requested by the interim Water Policy Committee" does not reflect the intent of the Committee. In addition, treating the funding as "one-time-only" is not consistent with state budgeting and appropriation law.

Title 17, chapter 7, MCA, governs state budgeting and appropriations. Section 17-7-102, MCA, contains definitions that apply to Title 17, chapter 7, MCA. Section 17-7-102(4), MCA, defines the "base budget" as:

(4)(a) "Base budget" means *the resources for the operation of state government that are of an ongoing and nonextraordinary nature in the current biennium. The base budget for the state general fund and state special revenue funds may not exceed that level of funding authorized by the previous legislature.* For the biennium beginning July 1, 2011, the term includes items specified in section 85, Chapter 489, Laws of 2009.

(b) The term does not include funding for water adjudication if the accountability benchmarks contained in 85-2-271 are not met. (emphasis added)

The term "present law base" is defined as:

(10)(a) "Present law base" means, subject to subsection (10)(b), *that level of funding needed under present law to maintain operations and services at the level authorized by the previous legislature*, including but not limited to:

(i) changes resulting from legally mandated workload, caseload, or enrollment increases or decreases;

(ii) changes in funding requirements resulting from constitutional or statutory schedules or formulas;

(iii) inflationary or deflationary adjustments;

(iv) elimination of nonrecurring appropriations; and

(v) items specified in section 85, Chapter 489, Laws of 2009.

(b) For the budget for the 2011 legislative session, present law base must be adjusted by reducing general fund budgets by the equivalent of that portion of the 2% across-the-board reduction assessed by the 61st legislature on selected agencies that was allocated by those agencies to personal services in the 2011 biennium. The director of the governor's office of budget

and program planning and the legislative fiscal analyst shall agree on a mechanism for determining how agencies have allocated this reduction. (emphasis added)

The term "new proposals" is defined as:

(9) "New proposals" means requests to provide new nonmandated services, to change program services, to eliminate existing services, or to change sources of funding. *For purposes of establishing the present law base, the distinction between new proposals and the adjustments to the base budget to develop the present law base is to be determined by the existence of constitutional or statutory requirements for the proposed expenditure. Any proposed increase or decrease that is not based on those requirements is considered a new proposal.* (emphasis added)

Section 17-7-111, MCA, provides direction for the preparation of the proposed state budget and for agency program budgets for the ensuing biennium. Section 17-7-111(3)(a), MCA, provides that the agency budget request for the ensuing biennium must set forth a balanced financial plan for the agency completing the forms for each fiscal year of the ensuing biennium. The plan must consist of a consolidated agency budget summary of funds subject to appropriation, as provided in section 17-8-101, MCA, for the current base budget expenditures, including statutory appropriations, and for each present law adjustment and new proposal request setting forth the aggregate figures of the full-time equivalent personnel positions (FTE) and the budget, showing a balance between the total proposed disbursements and the total anticipated receipts, together with the other means of financing the budget for each fiscal year of the ensuing biennium, contrasted with the corresponding figures for the last-completed fiscal year and the fiscal year in progress.

Section 17-7-112, MCA, contains submission deadlines and budgeting schedules for the proposed budget for the ensuing biennium. Section 17-7-112(6), MCA, provides that by November 1, the Budget Director shall furnish the Legislative Fiscal Analyst with a present law base for each agency and a copy of the documents that reflect the anticipated receipts and other means of financing the base budget and present law base for each fiscal year of the ensuing biennium.

Section 17-7-123, MCA, provides for the form of the Executive Budget to be submitted to the Legislature. Section 17-7-123(1)(d) and (1)(e)(i), MCA, provide that the budget must consist of base budget disbursements for the completed fiscal year of the current biennium, estimated comparable disbursements for the current fiscal year, and the proposed present law base budget plus new proposals, if any, for each department and each program of the department and a statement containing recommendations of the Governor for the ensuing biennium by program and disbursement category, including explanations of appropriation and revenue measures included in the budget that involve policy changes.

These statutes all indicate the importance of having appropriations for the current biennium accurately accounted for on the state budgeting and accounting system. If an appropriation for an ongoing statutory responsibility is not included in the base budget and present law

base, then it is not in conformity with the state budgeting statutes. The obvious intent of the Legislature in providing for the form of the Executive Budget is to determine the cost of ongoing statutory obligations and to have cost estimates for newly proposed programs and functions.

In State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975), the Montana Supreme Court held that notwithstanding Article VI, section 9, of the Montana Constitution, the Montana budget is a legislative budget, not an executive budget. Article V, sections 1 and 11, and Article VIII, sections 9, 12, and 14, of the Montana Constitution vest in the Legislative Branch the power not only to approve appropriation bills and a budget but to create an interim committee to gather information from other branches of government necessary to form a rational basis for its budget determinations.

The failure to adhere to the statutorily prescribed requirements for properly designating state agency functions and for submitting an Executive Budget to the Legislature impede the ability of the Legislature to form a rational basis for budget decisions. There is nothing in the legislative record to indicate that the Legislature intended the ground water investigation program established in the Montana Bureau of Mines and Geology to be temporary or that the funding for the program would not be included in the base budget for the 2011 legislative session. The Legislature clearly knows how to designate "one-time-only" appropriations and to exclude those appropriations from the base budget. For example, section 4 of House Bill No. 2, enacted as Chapter 488, Laws of 2009, provides that an appropriation item designated "One Time Only" or "OTO" may not be included in the present law base for the 2013 biennium. Section 3 of House Bill 617, which was not enacted, contained a similar statement. House Bill No. 645, enacted as Chapter 489, Laws of 2009, amended section 17-7-102, MCA, to provide that for the biennium beginning July 1, 2011, the "base budget" would include items designated in section 85 of that bill.

The fact that the Governor apparently erroneously believed that the 2007-2008 Water Policy Committee intended the funding for the ground water investigation program established in the Montana Bureau of Mines and Geology to be temporary or that the funding for the program was not be included in the base budget for the 2011 legislative session is not an adequate basis for not including funding for the program in the present law base and the base budget for the 2011 Executive Budget. If the Executive Branch wants to propose a different level of funding or if the Legislature chooses to adopt a different level of funding, they are free to do so. However, until those decisions are made, the applicable provisions of Title 17, chapter 7, MCA, should be adhered to.

I hope that I have adequately addressed your concerns. 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

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