

“CAT AND DOG” APROPRIATION BILLS AUTHORITY FOR FUND TRANSFERS

Prepared for the
Legislative Finance Committee
by

Jon Moe
Fiscal Specialist
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INTRODUCTION

In a report¹ prepared for the Legislative Finance Committee meeting of March 9, 2000, staff raised the following issue:

“There appears to be a long-standing assumption by fiscal managers and the legislature that “cat and dog” appropriations bills² are a separate source of appropriation authority that cannot be used to fund ongoing program costs usually funded in HB 2. However, the recent legal opinion³ indicates that assumption may not be supported by current statutes.”

The committee asked that Legislative Fiscal Division staff pursue this matter and report back at the next committee meeting.

THE ISSUE

In order to frame this issue, a discussion of one key question is provided:

What level of guidance does the legislature wish to provide for “cat and dog” appropriations?

HB 2 (and the pay plan bill) operating budget changes and program transfers are governed by 17-7-138 and 17-7-139, MCA, respectively (Attachment B). While the agencies are generally required to follow the intent of the legislature in how they expend their appropriations, they are allowed some flexibility in moving moneys around to effectively perform their activities. 17-7-138(1)(a), MCA, provides that “expenditures by a state agency must be made in substantial compliance with the budget approved by the legislature” and that “substantial compliance may be determined by conformity to the legislative intent as established in the narrative accompanying the general appropriations act.” The narrative is provided by the Legislative Fiscal Report prepared at the end of each session. The legislative intent is determined primarily from the “first level tables” (example in Attachment C) which indicate for a given program the amount appropriated for personal services, operating expenses, capital outlay, local assistance, grants, benefits and claims, transfers, and/or debt service. 17-7-139, MCA, provides that the approving authority may allow agencies to transfer appropriations between programs within each fund type within each fiscal year. Based upon statutory criteria, for operating budget changes and program transfers, the agencies must report a significant change to the Legislative Fiscal Analyst for review and comment by the Legislative Finance Committee. Significant change is defined in statute in this way:

¹ DPHHS: Budget Status Report/Potential for Supplemental Request, dated March 8, 2000, by Lois Steinbeck and Pat Gervais.

² A “cat and dog” appropriation bill is a bill passed by the legislature that includes an appropriation. The overwhelming majority of appropriations that support state government operations are made in the general appropriations act – HB2.

³ By the legislature’s legal counsel, Greg Petesch, March 6, 2000 (Attachment A).

“... an agency or program is considered to have a significant change in its scope, objectives, activities, or expenditures if:

(i) the expenditure change exceeds \$1 million; or

(ii) the expenditure change exceeds 25% of a budget category and the change is greater than \$25,000. If there have been other changes to the budget category in the current fiscal year, all the changes, including the change under consideration, must be used in determining the 25% and \$25,000 threshold.”

While 17-7-138 and 17-7-139, MCA, also govern “cat and dog” bills, legislative control is different in this respect. 17-7-138(3), MCA, requires that “the operating budget for money appropriated by the general appropriations act must be separate from the operating budget for money appropriated by another law”, except for the pay plan bill. Operating budgets for “cat and dog” appropriations are not based upon any supporting narrative, only on the language in the bill itself. Apparently, in the absence of specific limiting language in connection with the appropriation, an approving authority is not restricted from allowing a change in an agency’s operating budget for a “cat and dog” appropriation or from transferring spending authority to another program to spend for another purpose. However, as with changes related to HB 2 appropriations, significant changes must be reported. At the heart of this issue is the question of whether or not agencies should be allowed to transfer all or part of a “cat and dog” appropriation to another program, regardless of whether it is spent for a similar purpose or a different purpose.

Ironically, “cat and dog” appropriations may not be consistent with the traditional budget monitoring processes. Sometimes, the appropriation language in a “cat and dog” bill might not be specific enough to address the intended use of the moneys. For example, use of the money for personal services, operating, etc. is not specified so there is no way to assess, in that regard, whether or not the moneys are being spent as the legislature intended. As previously mentioned, for the “cat and dog” bills, there is no narrative available to determine legislative intent, except language that might be included in the bill. The Governor’s budget office uses the fiscal note attached to the bill to establish the operating plan for the appropriation. (The Legislative Fiscal Division staff use fiscal note information in a similar way when preparing amendments to HB 2 for impacts identified for other bills.) This is a logical source for this information, but the above referenced legal opinion, however, states that “fiscal notes are not adopted by the legislature and have no formal basis in interpreting legislation.”

OPTIONS

The following are a couple of options available to the committee:

- The committee might propose legislation that provides for a prohibition of transferring “cat and dog” appropriations to other programs, in whole or in part, unless specific language is provided authorizing such transfers.
- The committee can direct that the Legislative Fiscal Division (LFD) staff track the development of “cat and dog” legislation and alert the legislature to instances when additional language might clarify legislative intent regarding an appropriated amount. This language would provide the “narrative” needed to establish legislative intent for the

appropriation. In this option, there is also an implication that the drafter has a role in determining from the bill sponsor the extent to which an appropriation should be restricted. Possibilities might include whether the appropriation language needs to appropriate funds at the first level expenditure category (personal services, operating, local assistance, etc.) or adding a statement that the appropriation must be used for [the intended purpose] and may not be transferred to another program for any reason.

Legal Opinion

Attachment A

March 6, 2000

Lois Steinbeck
Legislative Fiscal Division
Room 494 Federal Building
P.O. Box 201711
Helena, Montana 59620-1711

Dear Ms. Steinbeck:

I am writing in response to your questions concerning Senate Bill No. 81, enacted as Chapter 571, Laws of 1999. Chapter 571, Laws of 1999, appropriated \$8 million in general fund that must be used for the state match for the Children's Health Insurance Program (CHIP). The appropriation may also be used to fund increases in the Medicaid program resulting from CHIP outreach efforts.

You have indicated that the fiscal note accompanying Senate Bill No. 81 estimated that Medicaid costs associated with the CHIP program outreach would be \$1.2 million in fiscal year 2000. The current budget data indicates that the Department of Public Health and Human Services anticipates using \$1.3 million of the Senate Bill No. 81 appropriation to fund increases in the Medicaid program, even though the Department does not have the capability of tracking individuals who applied for CHIP and were subsequently determined to be eligible for and were then enrolled in the Medicaid program.

You have also indicated that the Department estimates that there will be over-expenditures in various general fund appropriations and that the Department anticipates transferring general fund appropriations among programs and appropriations to cover the various shortfalls. You also indicate the Senate Bill No. 81 may not be fully expended because CHIP enrollment is less than anticipated for fiscal year 2000.

In light of these conditions, you have asked three specific questions that I will address individually. I have paraphrased the questions for purposes of my response.

(1) Can the Department use money anticipated in the fiscal note accompanying Senate Bill No. 81 for Medicaid costs if it cannot verify the amount as costs related to CHIP outreach?

Title 5, chapter 4, part 2, MCA, provides for fiscal notes to be prepared for legislation that will have an effect on revenue, expenditures, or the fiscal liability of the state. Fiscal notes are required to contain the estimated increases or decreases in revenue or expenditures, costs that may be absorbed without additional funds, and long-range financial implications.

Fiscal notes are not adopted by the Legislature and have no formal basis in interpreting legislation. Fiscal notes are a tool used by the Legislature to assist the Legislature in adopting a

balanced budget as required by Article VIII, section 9, of the Montana Constitution. There is nothing in law that requires an agency to conform to anything contained in a fiscal note.

The language in Senate Bill No. 81 authorizing the use of the appropriation for increases in Medicaid program costs resulting from the CHIP program outreach, is a limitation on the use of the appropriation. Section 17-8-103(2), MCA, provides that a condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation is expended for the purpose set forth in the act or until the condition or limitation is changed by a subsequent appropriation act. A condition or limitation in an appropriation act may not amend any other statute. In Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975), the Montana Supreme Court adopted the analysis of the Minnesota Supreme Court in State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951, 955 (1928), concerning the propriety of legislative conditions to university system appropriations as follows:

. . . At the one extreme, the Legislature has no power to make effective, in the form of a law, a mere direction of academic policy or administration. At the other extreme it has the undoubted right within reason to condition appropriations as it sees fit. "In such case the regents may accept or reject such appropriation. . . . If they accept, the conditions are binding upon them." (emphasis in original) Board of Regents at 451

The Montana Supreme Court determined that conditions attached to appropriations must be individually scrutinized to determine their propriety. Board of Regents at 451. Under the rationale and holding in Board of Regents, when the Legislature places a condition on an appropriation and the agency accepts an appropriation, the agency accepts the condition attached to the appropriation. If an agency feels that a condition attached to an appropriation is beyond the authority of the Legislature, it is incumbent upon the agency to challenge the condition or to demonstrate that the condition is contrary to statute. It is not acceptable that an agency merely ignore the condition and expend the appropriation.

Under this analysis, the Department has the burden to demonstrate, in some manner, that the amount of the appropriation contained in Senate Bill No. 81 that is used for the Medicaid program, results from CHIP outreach efforts.

(2) Can the Department use more of the \$8 million general fund appropriation in Senate Bill No. 81 for Medicaid costs than were anticipated in the fiscal note prepared for Senate Bill No. 81?

As discussed in question # 1, the fiscal note has no bearing on the appropriation. Therefore, the Department can use any amount of the appropriation contained in Senate Bill No. 81, that is not used for the CHIP program for Medicaid costs so long as the Department complies with the limitation contained in Senate Bill No. 81.

(3) Can the Department use the appropriation in Senate Bill No. 81 for costs other than CHIP and Medicaid expansion due to CHIP outreach? Can the appropriation be transferred to other programs within the Department? If the funds can be transferred to other programs, can the transferred funds be used to support other program costs unrelated to CHIP or Medicaid?

Section 17-7-138(1)(a), MCA, provides that agency expenditures must be made in "substantial compliance" with the budget approved by the Legislature. Substantial compliance may be determined by conformity to legislative intent as established in the narrative accompanying the general appropriations act. There is no similar test for "cat and dog" appropriations.

Section 17-7-138(3), MCA, requires that the operating budget for money appropriated in the general appropriations act must be separate from the operating budget for money appropriated by other laws, except state pay plan appropriations. Therefore, the operating budget for the appropriation in Senate Bill No. 81 must be separate from the Department's general operating budget. An operating budget must include expenditures for a program detailed by at least first-level categories. Those categories include personal services, operating expenses, equipment, capital outlay, local assistance, grants, benefits and claims, transfers, and debt service. However, section 17-7-138, MCA, also authorizes agencies to significantly change an operating budget. A significant change is defined as an expenditure change in excess of \$1 million or a change in excess of 25% of a budget category that exceeds \$25,000.

Section 17-7-139, MCA, provides that, unless prohibited by law, an agency may transfer appropriations between programs within each fund type within each fiscal year. Section 17-7-102, MCA, defines a program as a principal organizational or budgetary unit within an agency. The definition of "significant change" for fund transfers is the same as the definition that applies to operating budget changes. Program transfers must be completed within the same fund from which the transfer originated. If money is transferred from one fiscal year to another fiscal year, the money may not be retransferred.

The flexibility that the Legislature has delegated to agencies to use operating budget changes and fund transfers is extremely broad. There is no limit on the amount of change in an operating budget or on the amount of a fund transfer. House Bill No. 2, actually directs the Department to transfer up to \$2.3 million in general fund money from Medicaid appropriations and up to \$2.8 million in TANF funds to the disability services division if Title XX funds received from the federal government are less than the amount appropriated. I am unaware of any prohibition in law as required by section 17-7-139, MCA, that would preclude the Department from making and funding "significant changes" in its operating budget through the use of fund transfers.

Senate Bill No.81 requires that the appropriation contained in that bill must be used for the CHIP program. The provision for transferring a portion of the appropriation to the Medicaid program is permissive. There is no narrative accompanying the appropriation contained in Senate Bill No. 81, so there is no basis for determining "substantial compliance" with the Legislature's intent in appropriating the funds. So long as the CHIP program is fully funded, the Department may transfer any excess amount of the appropriation by complying with the provisions of sections 17-7-138 and 17-7-139, MCA.

I hope that I have adequately addressed your specific questions. If you have any additional questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

17-7-138. Operating budget. (1) (a) Expenditures by a state agency must be made in substantial compliance with the budget approved by the legislature. Substantial compliance may be determined by conformity to legislative intent as established in the narrative accompanying the general appropriations act. An explanation of any 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 change is time-sensitive, the approving authority may approve the change 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. Except as provided in subsection (2), the expenditure of money appropriated in the general appropriations act is contingent upon approval of an operating budget by August 1 of each fiscal year. An approved original operating budget must comply with state law.

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

(i) the expenditure change exceeds \$1 million; or

(ii) the expenditure change exceeds 25% of a budget category and the change is greater than \$25,000. If there have been other changes to the budget category in the current fiscal year, all the changes, including the change under consideration, must be used in determining the 25% and \$25,000 threshold.

(2) The expenditure of money appropriated in the general appropriations act to the university system units, as defined in 17-7-102, is contingent upon approval of an operating budget by October 1 of each fiscal year. All other requirements in this section apply to the university system.

(3) The operating budget for money appropriated by the general appropriations act must be separate from the operating budget for money appropriated by another law except a law appropriating money for the state pay plan or any portion of the state pay plan. Each operating budget must include expenditures for each agency program, detailed at least by first-level categories as provided in 17-1-102(3). Each agency shall record its operating budget and any approved changes on the statewide budget and accounting system. Forms used for changing an operating budget must reference the current, complete, and approved operating budget, show the proposed changes to the operating budget, and reference any other pending documents to change the operating budget.

17-7-139. Program transfers. (1) Unless prohibited by law, the approving authority may approve agency requests to transfer appropriations between programs within each fund type within each fiscal year. 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, 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.

(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.

Attachment C

Example of a “First Level Table” used to determine legislative intent (Excerpt from the Legislative Fiscal Report – 2001 Biennium)

Program Proposed Budget								
Budget Item	Base Budget Fiscal 1998	PL Base Adjustment Fiscal 2000	New Proposals Fiscal 2000	Total Leg. Budget Fiscal 2000	PL Base Adjustment Fiscal 2001	New Proposals Fiscal 2001	Total Leg. Budget Fiscal 2001	Total Leg. Budget Fiscal 00-01
FTE	889.83	107.29	14.25	1,011.37	146.15	14.25	1,050.23	1,050.23
Personal Services	33,031,284	5,076,026	390,576	38,497,886	5,883,496	387,847	39,302,627	77,800,513
Operating Expenses	196,336,341	87,827,148	1,327,369	285,490,858	68,397,312	530,369	265,264,022	550,754,880
Equipment	433,156	715,236	0	1,148,392	463,800	0	896,956	2,045,348
Capital Outlay	5,613,205	5,386,795	0	11,000,000	6,386,795	0	12,000,000	23,000,000
Grants	109,814	186	0	110,000	186	0	110,000	220,000
Debt Service	5,919	4,500	0	10,419	4,500	0	10,419	20,838
Total Costs	\$235,529,719	\$99,009,891	\$1,717,945	\$336,257,555	\$81,136,089	\$918,216	\$317,584,024	\$653,841,579
General Fund	0	0	0	0	0	0	0	0
State/Other Special	65,007,977	10,058,814	755,979	75,822,770	7,211,503	281,050	72,500,530	148,323,300
Federal Special	170,521,742	88,951,077	961,966	260,434,785	73,924,586	637,166	245,083,494	505,518,279
Total Funds	\$235,529,719	\$99,009,891	\$1,717,945	\$336,257,555	\$81,136,089	\$918,216	\$317,584,024	\$653,841,579

Program Description

The Construction Program is responsible for construction project planning and development from the time a project is included in the long-range work plan through the actual construction of the project. Program responsibilities include such tasks as project design, environmental documents and permits, right-of-way acquisitions, issuing contract bids, awarding contracts, and administering construction contracts. Contract administration is the documentation, inspection, and testing of highway construction projects from the time the contract is awarded to a private contractor until the project is completed and the work approved as meeting established construction standards. The Construction Program is mandated by 2-15-2501(1), MCA; Title 60, MCA; and 23 USC 116.

Funding

Applicable federal reimbursable costs of the federal-aid construction program are funded with highways state special revenue funds and federal special revenue funds apportioned to Montana under the Transportation Equity Act for the 21st Century federal transportation funding laws (TEA-21). Construction design, construction, and construction management costs and direct administrative costs for construction activities are generally applicable for federal reimbursement. The state match requirement is based on a sliding scale match, which generally is 87 percent federal with a 13 percent state match. The 100 percent state-funded construction program (formerly known as the Reconstruction Trust Fund program) is funded entirely with the highways state special revenue fund. The primary sources of revenue for the highways state special revenue fund are highway users fees derived from motor fuel taxes and gross vehicle weight fees.

For the 2001 biennium, state special revenue provides 22.7 percent of the program's funding and federal special revenue provides the remaining 77.3 percent.