VOLUME NO. 51 OPINION NO. 3

APPROPRIATIONS - Aggregation of line item appropriations to satisfy contingent voidness clause in HB 22, 59th Legislative Assembly;
FEES - Applicability of contingent voidness clause in bill applying water use fee;
LEGISLATIVE BILLS - Applicability of contingent voidness clause in bill applying water use fee;
STATUTORY CONSTRUCTION - Applicability of contingent voidness clause in bill applying water use fee;
STATUTORY CONSTRUCTION - Consideration of legislative records in determining legislative intent;
STATUTORY CONSTRUCTION - Preference for construction that gives effect over one that renders void;
STATUTORY CONSTRUCTION - Use of singular includes plural absent demonstrated legislative intent to the contrary;
STATUTORY CONSTRUCTION - Inapplicability of statutory definition of term in separate statute where context suggests different meaning;
WATER AND WATERWAYS - Applicability of contingent voidness clause in bill applying water use fee;
MONTANA CODE ANNOTATED - Sections 1-2-102, -105(3), -107, 1-3-223, -232, 5-16-101, 17-7-102(11), 85-2-212 et seq.;
MONTANA LEGISLATIVE SERVICES BILL DRAFTING MANUAL 2004 - Sections 2-7, 2-8;
MONTANA LEGISLATIVE SESSION 59 - House Bills 2, 22.

HELD: More than $2 million has been appropriated in a line item from state sources other than the water adjudication account provided in HB 22, § 7, for the purposes of funding Montana's water adjudication program. Accordingly, HB 22 is not void pursuant to its contingent voidness provision.

June 13, 2005

The Honorable Brian Schweitzer
Governor of Montana
State Capitol
P.O. Box 200801
Helena, MT 59620-0801

Dear Governor Schweitzer:

You have requested my opinion on the following question:

> Has at least $2 million been "appropriated in a line item" for each fiscal year from state sources other than the water adjudication account provided for in section 7 of House Bill 22 passed by the 59th legislature for the purposes of funding Montana's water adjudication program?

Your question arises from the following situation. In the legislative interim following the 2003 legislative session, the Environmental Quality Council ("EQC"), a committee of the legislature, Mont. Code Ann. § 5-16-101, conducted a study of the state-wide water adjudication in progress under Mont. Code Ann. §§ 85-2-212 et seq. A major issue of concern in the study was the perceived delay in completion of the adjudication, which commenced in 1979.

In December, 2004, EQC issued a report of its findings. The report concluded, among other things, that additional funding through a new funding source was required to supplement existing funding levels, accelerate the adjudication process, and ensure its accuracy. EQC, Montana's Water--Where Is It? Who Can Use It? Who Decides?, Report to the 59th Legislature (December, 2004) at 74-80 (hereafter "Montana's Water"). At EQC's request, a bill was drafted and introduced in the 59th Legislative Assembly as HB 22 to implement some of the recommendations of the study. The bill provided, among other things, for the creation of a water adjudication account funded by a sliding scale schedule of fees to be paid by most persons and entities claiming water in the adjudication. HB 22, § 7.

As initially drafted, HB 22 contained a contingent voidness clause providing:

> Contingent voidness. If at least $2 million is not ***line item appropriated*** in any fiscal year from state sources other than the water adjudication account in [section 7] per year, for the purposes of funding Montana's water adjudication program, then [this act] is void.

(Emphasis added.) In drafting revisions prior to introduction, the language of this clause was changed to read as follows:

> Contingent voidness. If at least $2 million is not appropriated ***in a line item*** for each fiscal year from state sources other than the water adjudication account provided for in [section 7], for the purposes of funding Montana's water adjudication program, then [this act] is void.

(Emphasis added.) The revised language remained in the bill as passed.

The term "line item appropriation" has a well-understood meaning. An "appropriation" is "an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state." State ex rel. Haynes v. District Court, 106 Mont. 470, 476-77, 78 P.2d 937, 941 (1938), quoting State ex rel. Bonner v. Dixon, 59 Mont. 58, 78, 195 P. 841, 845 (1921). The term "line item" is a reference to the organizational structure of the general appropriation bill, traditionally styled as House Bill 2. In the 59th Legislature, as in prior legislatures, HB 2 is divided into sections, departments, and programs. For each category of expenditure, such as personal services, equipment, and travel, the bill usually sets forth separate lines of appropriation stating the amounts appropriated for each category. See generally Board of Regents v. Judge, 168 Mont. 433, 440-51, 543 P.2d 1323, 1327-34 (1975) (describing line item appropriation process and holding that the legislature lacks the power to control management decisions of the Board of Regents through conditions enacted in line item appropriations in the University system budget). The process of line item appropriation therefore allows the legislature to direct appropriations within agencies to certain purposes.

It is clear that neither HB 2 nor any other appropriation measure passed by the 59th Legislative Assembly contains a single line item appropriation in excess of $2 million for a program entitled "water adjudication program." However, it is likewise clear that several separate line items in the budgets of various agencies are devoted to the operation of various aspects of the adjudication. The Departments of Fish, Wildlife, and Parks and Natural Resources and Conservation have reviewed HB 2 and determined that more than $2.5 million has been appropriated in various line items in the budgets of the Department of Natural Resources and Conservation, the Reserved Water Rights Compact Commission, the Water Court, and the Attorney General, all dedicated to some portion of the adjudication. If the use of the term "a line item" means that only a single line item exceeding $2 million in a single "water adjudication program" budget can satisfy the contingent voidness clause, then it appears HB 22 is void. If, on the other hand, the term is not limited to a single line item and permits the aggregation of any line items that

support the adjudication, then it appears that the contingent voidness clause may be satisfied if the various appropriations identified by the agencies can be said to be "for the purposes of funding Montana's water adjudication program." I discuss each of these issues in turn.

I.

Use of singular or plural language in legislation is generally not a matter of substantive significance. The common law rule of interpretation, codified in Montana at Mont. Code Ann. § 1-2-105(3), is that "[t]he singular includes the plural and the plural the singular." See, e.g., Boyes v. Eddie, 1998 MT 311, ¶ 27, 292 Mont. 152, 158, 970 P.2d 91, 95 (reference to "tax notice" in statute requiring mail notice of the potential for issuance of tax deeds permitted mailing of multiple notices together); Hauswirth v. Mueller, 25 Mont. 156, 161, 64 P. 324, 326 (1901) (reference to "time and place" of election allowed use of multiple polling places). The Legislative Services Division, in its instructions to bill drafters, incorporates this rule: "Use the singular instead of the plural when possible. The singular includes the plural." (See section 1-2-105(3), MCA.)." Legislative Services Division, Bill Drafting Manual 2004, § 2-8 at 15 (hereafter "Manual").

The rule is not absolute, however. Where the legislature intends that the use of the singular have limiting significance, the terminology used or the legislative history may overcome the general rule. See State v. Sand Hills Beef, 196 Mont. 77, 84-85, 639 P.2d 480, 484 (1981) (where legislature amended "supervising officer or officers" to read "supervising officer," legislative intent to limit reference to single officer was apparent and general rule not applied).

It would therefore appear that one asserting that the use of the term "a line item" in preference for the term "not line item appropriated" limits consideration to a single line item appropriation bears the burden to show that such an interpretation was clearly intended. In this case, the contrary appears to be true.

The change from the original language, which in my opinion clearly would have allowed aggregation of multiple line items, to the language that appeared in the enacted bill was made in the drafting process before the bill was introduced. It appears most likely that the legislative drafters modified the original proposed bill language to give effect to another rule of draftsmanship, the elimination where possible of the use of passive voice. Manual, § 2-7 at 15 ("Whenever possible, draft in the active voice instead of the passive.") In making this editorial change, the drafter applied § 2-8 and drafted the provision in the singular rather than the plural.

Pursuant to the Supreme Court's decision in Sand Hills Beef, consideration of legislative history is appropriate in determining whether the statutory preference for inclusion of the plural in the singular applies. In this case, there is no evidence that this change was intended to have substantive significance. The EQC report that gave rise to HB 22 provides good evidence of the intention of the legislature in putting forward the legislation. See Nichols v. School Dist. No. 3, 87 Mont. 181, 184, 287 P. 624, 625 (1930) (in considering legislative history, court may consider proceedings of the legislature as disclosed by its records). The report is quite clear about the intentions of the sponsoring committee with respect to the need to generate additional revenue to fund the adjudication and the use of additional fees for that purpose.

EQC first identified the problem, stating that "if the adjudication process is going to be sped up and made more accurate it will require additional funding." Montana's Water at 73. EQC then reviewed the funding of three separate agency budgets devoted to aspects of the adjudication--DNRC, the Water Court, and the Reserved Water Rights Compact Commission, observing that "[h]istorically, a majority of the funding has been directed to DNRC" and discussing the issue of moving funding between the DNRC budget and that of the Water Court. Id. at 77. EQC also observed that the pursuit of accuracy would require some method of bringing issue remarks before the Water Court for review, a function that the legislature ultimately assigned in part to the Attorney General in HB 782. EQC concluded its discussion of the issue of "the need for increased funding in the water adjudication program" by describing its proposal for a fee imposed on water right holders, a proposal that ultimately gave rise to the fee proposal in HB 22.

Against this backdrop, the suggestion that the legislature intended HB 22 to be nugatory in the absence of a single $2 million line item appropriation for the "water adjudication program" makes no sense. EQC was well aware that various agency budgets contributed to the success of the adjudication program. Its table setting forth current level expenditures, found in Montana's Water at 74, includes the budgets of DNRC, the Water Court, and the Compact Commission in setting forth the current level expenditures. EQC also considered the increased cost incurred in resolving the issue remark problem. Montana's Water at 75. As the legislature was presumptively aware, see Department of Revenue v. Burlington Northern, 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976) ("We must presume the legislature knew what it was doing and was cognizant of the statutes of Montana as then enacted."), in no prior year had any single annual budget line item devoted to the adjudication for any of these agencies exceeded even $700,000, let alone $2 million. And, there is no evidence that in considering HB 2 the legislature even considered any proposal for a single line item dedicated to the "water adjudication program" in excess of $2 million.

Thus, to reach the conclusion that HB 22 is void, one would have to assume that the legislature knew when it passed the bill that the fee provisions would never take effect at all. The law strongly presumes against such an intent. Voidness clauses are not favored. "An interpretation which gives effect is preferred to one which makes void." Mont. Code Ann. § 1-3-232.

> The object sought to be achieved by this legislation is a primary consideration in our interpretation of it. . . . The legislature does not perform useless acts. Section 1-3-223, MCA. An interpretation that gives effect is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage. Section 1-3-232, MCA.

American Linen Supply Co. v. Department of Revenue, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980). Finally, the Montana Supreme Court "presumes that the legislature would not pass meaningless legislation." Montana Contractors' Ass'n v. Department of Highways, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986).

For the foregoing reasons, it is my opinion that in evaluating the application of the contingent voidness clause found in § 15 of HB 22, the reference to "a line item" does not limit consideration to any single line item, but allows aggregation of all line items that are "for the purposes of funding Montana's water adjudication program." I now turn to the question of whether line items in HB 2 may be said to be for those purposes.

II.

It has been suggested that the word "program" in § 15 of HB 22 is limited to those "programs" within the definition of the term found in § 5 of HB 2, which in turn incorporates the definition found in Mont. Code Ann. § 17-7-102(11): "'Program' means a principal organizational or budgetary unit within an agency." HB 2, § 5 further provides that the term "program" is used in HB 2 in a manner that "is consistent with the management and accountability structure established on the statewide accounting, budgeting, and human resources system, and is identified as a major subdivision of an agency ordinally numbered with an Arabic numeral." The argument is then made that the Reserved Water Rights Compact Commission is not a "program" within that definition, and that the aggregation of appropriations would fail to exceed $2 million in any event if the Compact Commission's appropriations were not included. I find the initial premise of this argument--that "program" in HB 22, § 15 is the same as "program" in HB 2, § 5--unconvincing, and it is therefore unnecessary to consider whether the Compact Commission is a "program" under the other statutes.

The simple fact is that the definition of "program" for application to the provisions of HB 2 is largely irrelevant to the interpretation of the term in HB 22. The operative term in this case is "program" as used in HB ***22***, not HB 2. While definitional statutes are generally imported from place to place in the code, this rule does not apply "where a contrary intention plainly appears." Mont. Code Ann. § 1-2-107; see Richter v. Rose, 1998 MT 165, ¶¶ 17-20, 289 Mont. 379, 962 P.2d 583 ("contrary intention plainly appears" where definitions claimed to be imported in eminent domain proceeding were all by their terms limited to application in other specific parts of the code).

As discussed above, EQC took the view that various budget authorizations, not just the one for the Water Court, made up the "adjudication program" for purposes of its analysis. Recall that the entire purpose of the new fee structure was to increase spending on the adjudication above its current level, and that EQC evaluated the current level by aggregating elements of three different agency budgets, those of DNRC, the Water Court, and the Compact Commission, and considering additional costs for other improvements designed to further the accuracy of the adjudication. The contingent voidness provision appears clearly to have been designed to make sure that the legislature continued at least the current level of funding, which EQC had calculated to be slightly more than $2 million, before the funding provided by the new fee would be available. The provision would thus guard against using the new fee simply to switch funding source by allowing the legislature to decrease funding from the general fund and replace it with funding from the new fee.

A narrow construction of the term "program" to exclude consideration of one of the very agencies that EQC included in its analysis would defeat the entire purpose of the legislation. The analysis concluding part I of this opinion applies with equal force here. The intention of the legislature controls the interpretation of the language it uses. Mont. Code Ann. § 1-2-102. In pursuing that intention, the objective of the legislation must be considered, and a construction that frustrates the achievement of that objective must be rejected. Willoughby v. Loomis, 264 Mont. 44, 52, 869 P.2d 271, 276 (1994). Here, the legislature in its consideration of HB 22 clearly did not intend that the term "program" be limited to those agency operations that meet the definitions found in HB 2 and Mont. Code Ann. § 17-7-102(11). Rather, it had a specific objective in mind--to increase the funding available for purposes of the adjudication above the level found in the current budgets of the agencies that were participating in that task. I therefore conclude that the term "Montana's water adjudication program" is not limited by the definition of "program" in HB 2, § 5, but rather may include any agency budget line item devoted to the advancement of the adjudication process.

THEREFORE, IT IS MY OPINION:

> More than $2 million has been appropriated in a line item from state sources other than the water adjudication account provided in HB 22, § 7, for the purposes of funding Montana's water adjudication program. Accordingly, HB 22 is not void pursuant to its contingent voidness provision.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cdt/jym