VOLUME NO. 51 OPINION NO. 13

CORRECTIONS - Establishing methamphetamine treatment programs through contracts with private Montana nonprofit corporations;
DRUGS - Establishing methamphetamine treatment programs through contracts with private Montana nonprofit corporations;
PUBLIC CONTRACTS - Inapplicability of privatization review procedures where legislature requires implementation of program through contracts with private vendors;
STATUTORY CONSTRUCTION - Plain meaning of statutory language requires no extrinsic aids to interpretation;
STATUTORY CONSTRUCTION - "Shall" generally connotes mandatory duty;
STATUTORY CONSTRUCTION - Specific requirement controls over inconsistent general provision;
MONTANA CODE ANNOTATED - Title 2, chapter 8, part 3; Title 18; sections 1-2-101, -102, 1-3-223, 2-8-301 to -304, -301(1), (3)(a), (4), -302, (2) to (5)(a), (6), -303, 45-9-102, 53-1-203, (1)(a), (1)(c), (2), 46-18-201, -202, 53-1-203, (1), (a), (c), (ii), (2);
MONTANA CONSTITUTION - Article VI, section 10(2);
OPINIONS OF THE ATTORNEY GENERAL - 51 Op. Att'y Gen. No. 4 (2005).

HELD: When the Department of Corrections contracts with a Montana private nonprofit corporation to establish residential methamphetamine treatment programs pursuant to Mont. Code Ann. § 53-1-203(1)(c)(ii), it need not undergo the privatization plan process outlined in Mont. Code Ann. §§ 2-8-302 and 2-8-303.

February 28, 2006

Mr. Bill Slaughter, Director
Department of Corrections
1539 Eleventh Avenue
Helena, MT 59620-1301

Dear Mr. Slaughter:

You have requested my opinion on a question that I have phrased as follows:

> When the Department of Corrections contracts with a Montana private nonprofit corporation to establish residential methamphetamine treatment programs pursuant to Mont. Code Ann. § 53-1-203(1)(c)(ii), must the Department first undergo the privatization plan process outlined in Mont. Code Ann. §§ 2-8-302 and 2-8-303?

Your question arises from the adoption of HB 326 of the 2005 legislative session, which directed the Department of Corrections (DOC) to establish residential methamphetamine treatment programs through contracts with private Montana non-profit corporations. Since 1991, Montana law has contained procedural restrictions on the authority of government agencies to "privatize" government functions. Mont. Code Ann. §§ 2-8-301 to 304. You ask whether the privatization statutes apply to the contracts referred to in the HB 326 amendments.

Montana Code Annotated Title 2, chapter 8, part 3 creates an administrative review process that must be followed before "an agency" may "privatize" a "program." "'Agency' means an office, position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the executive, legislative, or judicial branch of state government." Mont. Code Ann. § 2-8-301(1). "'Program' means a legislatively or administratively created function, project, or duty of an agency. Id., (4). "'Privatize' means an agency contracting with the private sector to provide services that are currently or normally conducted directly by the employees of the state." Id., (3)(a).

The privatization review statutes create an administrative process for evaluating privatization proposals prior to implementation by an agency. Under Mont. Code Ann. § 2-8-302, an agency proposing to privatize a program must prepare a privatization plan and release it to the public and any involved labor unions and submit it to the legislative audit committee at least 180 days in advance of the implementation of the proposal. The legislative audit committee must hold a public hearing on the proposal at least 90 days before implementation, release a summary of the hearing and its findings and conclusions at least 45 days before implementation, and vote on an advisory recommendation to approve or disapprove the proposal and transmit its recommendation to the Governor at least 30 days before implementation. The Governor then must approve or disapprove the proposal no less than 15 days prior to its proposed implementation date.

HB 326 was introduced to provide sentencing alternatives for persons convicted of second or subsequent offenses of methamphetamine possession. It amended Mont. Code Ann. § 45-9-102, the statute prohibiting possession of dangerous drugs, to provide a

specific sentence for second-offense possession of methamphetamine that included a possibility of placement in a residential community-based methamphetamine treatment program.

Recognizing that no such centers existed in Montana, the legislature included section 3 in HB 326, which amended Mont. Code Ann. § 53-1-203, the statute setting forth the general powers and duties of DOC. These amendments gave DOC rulemaking authority regarding residential methamphetamine treatment programs, Mont. Code Ann. § 53-1-203(1)(a).

They also added to the existing subsection (1)(c) of the statute, which provided that DOC "shall…contract with private, nonprofit Montana corporations to establish and maintain . . . prerelease centers for inmates at a Montana prison," the language at issue in this matter. The newly added language, read together with the existing provision to which it is attached, provides that DOC

> shall . . . contract with private nonprofit Montana corporations to establish and maintain . . .
> (ii) residential methamphetamine treatment programs for the purpose of alternative sentencing as provided for in 45-9-102, 46-18-201, 46-18-202, and any other sections relating to alternative sentences for persons convicted of possession of methamphetamine. The department shall issue a request for proposals using a competitive process and shall follow the applicable contract and procurement procedures in Title 18.

In interpreting statutory language, I follow the same rules applied in courts. The plain language of a statute controls, and I may neither add what has been omitted nor omit what the legislature has included. Mont. Code Ann. § 1-2-101. Where the language of a statute is plain on its face, resort to extrinsic rules of construction is inappropriate. See, e.g., Marriage of Christian, 1999 MT 189, ¶ 12, 295 Mont. 352, 983 P.2d 966. Here, the language of the statute admits only one interpretation--that the legislature required DOC to establish the methamphetamine treatment program through contracts with private vendors rather than through a state agency within the department.

The use of the word "shall" generally connotes a mandatory duty rather than a discretionary one. Here, the word appears three separate times in Mont. Code Ann. § 53-1-203 as amended, initially in the first line of subsection (1) as it sets forth the affirmative duties of DOC, next in the requirement that DOC "***shall issue requests for proposals*** using a competitive process," and finally in the requirement that DOC "***shall***

follow the applicable contract and procurement procedures in Title 18." (Emphasis added.) The suggestion that the legislature expected that there should be a further discretionary determination by the Governor through the privatization review process as to whether to follow these requirements finds no support in any statutory language, and I cannot through construction of such plain language insert a requirement that the legislature omitted. In the absence of some statutory language qualifying the mandatory import of the terminology the legislature used, I am unable to find a legislative intent to subject this program to privatization review under Mont. Code Ann. tit. 2, ch. 8, pt. 3.

The argument that this language contemplated that DOC would first comply with the privatization review process before letting the contract that the legislature said it "shall" make with "private nonprofit Montana corporations" is fraught with difficulty. First, the decision to assign this function to private contractors was made by the legislature, not DOC. While the definition of "agency" in Mont. Code Ann. § 2-8-301(1) includes "an office, position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the … legislative …branch," the idea that it includes the legislature as a body exercising its constitutional legislative power is anomalous. The legislature exercises plenary constitutional power to establish state policy by enacting laws. The privatization statutes cannot be construed to add mandatory procedural requirements that the legislature must meet in exercising its own power to make law. Cf. 51 Op. Att'y Gen. No. 4 (2005) (legislatively enacted spending cap is not an enforceable bar to subsequent legislature's spending in excess of cap). HB 326 states that the residential methamphetamine treatment programs are to be privately contracted. The legislature need not follow the general provisions of the privatization process statutes when it exercises its own power to legislate.

The application of the privatization procedures in this context also would require an idle act. See Mont. Code Ann. § 1-3-223 ("The law neither does nor requires idle acts."). The legislature dictated that DOC would perform this function through private contracts. The Governor signified his assent to this requirement by his signature on the bill. Had he wanted the sentencing changes and the treatment program without the private contracting provision, he could have exercised his amendatory veto under Mont. Const. Art. VI, § 10(2), but he did not. The privatization review process culminates in a discretionary decision by the Governor to approve or disapprove the project. Mont. Code Ann. § 2-8-302(6). The Governor has already exercised his discretion regarding this project by signing the bill without suggested changes as to the requirement of private contracts. A second review would be an idle act.

In at least some cases the application of the privatization process would create conflicting provisions with respect to the function of the legislative audit committee. Mont. Code Ann. § 53-1-203(2) provides a function for the audit committee for contracts made under subsection (1)(c) of the statute, which would include the contracts for residential methamphetamine treatment under HB 326. If the contract term will exceed ten years, DOC must submit the contract to the audit committee, and consider any comments or recommendations the committee might choose to make. This provision contains no requirements for the public hearing and recommendation vote that would be required under the privatization statutes. Compare Mont. Code Ann. § 53-1-203(2) with Mont. Code Ann. § 2-8-302(2) to (5)(a). Presumably, if the term of a contract under Mont. Code Ann. § 53-1-203(1)(c) does not exceed ten years, the audit committee plays no role. The provision in Mont. Code Ann. § 53-1-203(2) of a specific but more limited role for the committee in contracts under Mont. Code Ann. § 53-1-203(1)(c) negates the inference that the general but more extensive requirements for committee review in the privatization statutes also apply. Mont. Code Ann. § 1-2-102 ("When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.").

I express no opinion here as to the application of the privatization review statutes in cases in which the legislature has not required implementation of a program through contracts with private parties rather than through establishment of a program within an agency. Your letter and the submissions of interested parties have argued as to whether the creation of a new program that will not displace existing state workers constitutes "privatization" under Mont. Code Ann. § 2-8-301(3)(a) (""Privatize' means an agency contracting with the private sector to provide services that are currently or normally conducted directly by the employees of the state."), focusing on the effect of amendments to the privatization statutes adopted in the 2005 legislative session in SB 299. Since I have concluded that the legislature did not intend to subject these contracts to privatization review under Mont. Code Ann. tit. 2, ch. 8, pt. 3, it is unnecessary to consider in this opinion whether HB 326 would have triggered privatization review in the absence of a legislative direction to implement the treatment programs through private contracts.

THEREFORE, IT IS MY OPINION:

> When the Department of Corrections contracts with Montana private nonprofit corporations to establish residential methamphetamine treatment programs

pursuant to Mont. Code Ann. § 53-1-203(1)(c)(ii), it need not undergo the privatization plan process outlined in Mont. Code Ann. §§ 2-8-302 and 2-8-303.

Sincerely,

MIKE McGRATH
Attorney General

mm/cdt/jym