

CITIES AND TOWNS - Authority to incorporate a municipality within the boundary of an existing resort area;

MUNICIPAL GOVERNMENT - Authority to incorporate a municipality within the boundary of an existing resort area;

RESORT AREA DISTRICT - Impact of municipal incorporation on existing resort area;

MONTANA CODE ANNOTATED - Title 7, chapter 2, part 41; Title 2, chapter 6, part 15; sections 1-2-101, 2-15-501, 7-2-4101, -4101 to -4111, -4103(2), -4901 to -4920, 7-6-1501, (4), (a), (b), (c), (d), (5), (a), (b), (c), (d), -1502, -1502 to -1509, -1504, -1508, -1532, -1532 to -1540, -1542, -1543, -1548 to -1550.

- HELD:
1. A municipality may be organized within the boundaries of a resort area or resort area district.
 2. The incorporation of a municipality within the boundaries of a resort area does not alter the boundaries of the area, exclude property that is within the boundaries of the newly created municipality from the application of the resort tax, or preclude the expenditure of the area's resort tax revenue for expenses or projects within the municipality's boundaries as provided by law.

April 7, 2009

Mr. Marty Lambert
Gallatin County Attorney
1709 West College
Bozeman, MT 59715

Dear Mr. Lambert:

[P1] You have requested my opinion on the following question:

What effect would municipal incorporation of a portion of the property of a resort district area have upon the boundaries and/or administration of the resort area district?

[P2] Your question is prompted by a proposal of local residents to incorporate a new Town of Big Sky under the authority of Mont. Code Ann. § 7-2-4101 through 7-2-4111. The boundary of the proposed town lies within the existing Big Sky Resort Area District (resort area district), which was first approved by the voters in 1992. Creation of the resort area allows imposition of a resort tax on various goods and services sold within its boundaries. Mont. Code Ann. § 7-6-1508. Electors have further approved the area as a resort area district, which means it is governed by a board of directors rather than the county commissioners. Mont. Code Ann. § 7-6-1543. The board is authorized to appropriate and expend revenue from the resort tax in accordance with Mont. Code Ann. § 7-6-1542.

[P3] The proposal to create a new town within the boundary of the existing resort area district has prompted concerns that incorporation may somehow affect the status of the resort area district, or its resort taxing authority. Your letter indicates that approximately 70 percent of the electorate living in the resort area resides within the boundaries of the proposed town. It further appears that the proposal for a new town of Big Sky is quite controversial, evidenced by an article in the Bozeman Daily Chronicle in November 2007. See Bozeman Daily Chronicle, Talk of a Big Sky Town Looking to Incorporate, Nov. 11, 2007.

[P4] The statutes addressing the organization and incorporation of new municipalities are set forth in Title 7, chapter 2, part 41. The only boundary restriction is set forth in Mont. Code Ann. § 7-2-4103(2), which requires that “the boundary of the proposed territory to be incorporated is more than 3 miles from the boundary, measured from the nearest point between the two, of any presently incorporated city or town[.]” Nothing in the law prohibits incorporation of a city or town where the area to be incorporated lies within the boundaries of an existing resort area district. I conclude that the residents within the proposed municipality may petition to organize a Town of Big Sky under Mont. Code Ann. § 7-2-4101, irrespective of the fact that the municipality will lie within the existing Big Sky resort area district.

[P5] The next consideration is whether incorporation of a new city or town would affect the boundary or administration of the existing resort area district. Section 7-6-1501 defines two entities with resort tax authority: (1) a resort area, which is unincorporated, and (2) a resort community, which is incorporated:

- (4) A “resort area” means an area that:
 - (a) is an unincorporated area and is a defined contiguous geographic area;

(b) has a population of less than 2,500 according to the most recent federal census or federal estimate;

(c) derives the major portion of its economic well-being from businesses catering to the recreational and personal needs of persons traveling to or through the area for purposes not related to their income production; and

(d) has been designated by the department of commerce as a resort area prior to its establishment by the county commissioners as provided in 7-6-1508.

(5) A “resort community” means a community that:

(a) is an incorporated municipality;

(b) has a population of less than 5,000 according to the most recent federal census or federal estimate;

(c) derives the primary portion of its economic well-being related to current employment from businesses catering to the recreational and personal needs of persons traveling to or through the municipality for purposes not related to their income production; and

(d) has been designated by the department of commerce as a resort community.

The statutes describe how each entity is created and how the resort tax is to be administered, Mont. Code Ann. §§ 7-6-1502 through -1509, but they are silent on the question of whether an existing resort entity is affected by any subsequent change within its boundaries, such as a change of population or incorporated status.

[P6] The statutes are also silent as to whether a resort community or resort area, once created, may be dissolved. There are specific statutory procedures for dissolving an established resort area district, Mont. Code Ann. §§ 7-6-1548 through -1550, but no indication that dissolution of the district affects the status or boundary of the resort area, other than to change its governing body. Similarly, there is no process whereby a resort taxing entity, once approved by the voters and designated by the department of commerce, is reevaluated for compliance with the definitions that allowed it to become a resort taxing entity in the first place.

[P7] The legislature’s silence is revealing, as it suggests that a resort taxing entity continues in existence until dissolved (if allowed by statute), and maintains its status irrespective of subsequent changes within the district. When the Big Sky resort area was first established in 1992, it qualified for that status precisely because it was an unincorporated area with fewer than 2,500 residents. Based on those qualifications and designation, and with the approval of 15 percent of the electors in the area, the Big Sky

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resort area obtained its resort taxing authority pursuant to Mont. Code Ann. § 7-6-1508. The administration and expenditure of the resort tax passed to the board of the resort area district once the district was created in accordance with Mont. Code Ann. §§ 7-6-1532 through -1540.

[P8] Even if the resort area district is dissolved under Mont. Code Ann. §§ 7-6-1548 through -1550, the resort area as originally established continues to exist, and there is no process for its dissolution. The electorate of the resort area or resort community may amend or repeal a resort tax in accordance with Mont. Code Ann. § 7-6-1504, but that vote does not affect the status of the resort area or resort community itself. In short, the resort tax statutes contemplate a one-time drawing of resort area boundaries based on population and status of incorporation, subject to voter approval, which, once established, remains a resort area with resort tax authority that is unaffected by subsequent changes within the area. It follows that all of the territory within the boundaries of a resort area must remain part of the area and subject to the rules that govern the manner in which the property is taxed and the purposes for which the tax revenue may be spent. This would necessarily include territory that might subsequently become incorporated as a municipality.

[P9] If the Legislature had contemplated changes to resort area boundaries or subsequent limitations on the area's taxing authority, it could have so provided. For example, the statutes governing municipalities outline a process whereby the municipality can be disincorporated, either automatically or by election. Mont. Code Ann. §§ 7-2-4901 to -4920. No similar process is provided for a resort area. When construing statutes, I am not at liberty to insert what has been omitted, or omit what has been inserted. Mont. Code Ann. § 1-2-101. Absent some indication that the Legislature contemplated after-the-fact adjustment of resort area boundaries and taxing authority, I am not free to impose those requirements on an existing resort area. The resort area district and its corresponding taxing authority will continue to exist at least until 2032, as in 2006 the voters in the district approved its operation and extension through that date.

[P10] In addition to the question posed, several interested parties have asked whether the town, once incorporated, could administer its own resort tax as a resort community under Title 7, chapter 6, part 15, Montana Code Annotated, and how that would affect the resort tax currently administered by the board of the resort area district. These questions are purely hypothetical, as they are dependent in the first instance upon voter approval of the new municipality, and second, upon voter approval of a community resort tax (Mont. Code Ann. § 7-6-1502). They are also complex, as the Legislature did not contemplate overlapping resort taxing authorities, and there is no statutory guidance on the administration of resort taxes when one of the taxing authorities may also levy and collect

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property taxes within the city or town. Given these complexities and the possibility that the proposed incorporators intend to generate revenue through property taxes and not through resort taxes, I decline to address the additional questions posed. The scope of this opinion is therefore limited to a discussion of how an existing resort area district and its taxing authority is affected by incorporation of a city or town within the boundaries of the district. It does not address the broader question of how the respective resort taxes are administered if the city or town is created, the department of commerce designates that town as a resort community, and the electors of the resort community authorize their municipality to impose a resort tax within the corporate boundary.

THEREFORE IT IS MY OPINION:

1. A municipality may be organized within the boundaries of a resort area or resort area district.
2. The incorporation of a municipality within the boundaries of a resort area does not alter the boundaries of the area, exclude property that is within the boundaries of the newly created municipality from the application of the resort tax, or preclude the expenditure of the area's resort tax revenue for expenses or projects within the municipality's boundaries as provided by law.

Sincerely,

STEVE BULLOCK
Attorney General

sb/jma/jym