

VOLUME NO. 43

OPINION NO. 56

CITIES AND TOWNS - Power to consolidate municipal fire department with rural fire district;

CITIES AND TOWNS - Provision of fire protection services by interlocal agreement;

CONSOLIDATION - Consolidation of municipal fire department with rural fire district;

DISASTER AND EMERGENCY SERVICES - Provision of fire protection services by interlocal agreement;

ELECTIONS - Use of initiative for interlocal agreement;

FIRE DEPARTMENTS - Consolidation with rural fire district;

FIRE DEPARTMENTS - Provision of fire protection services by interlocal agreement;
INITIATIVE AND REFERENDUM - Use of initiative for interlocal agreement;
INTERGOVERNMENTAL COOPERATION - Provision of fire protection services by interlocal agreement;
LOCAL GOVERNMENT - Power to consolidate municipal fire department with rural fire district;
MUNICIPAL GOVERNMENT - Power to consolidate municipal fire department with rural fire district;
MONTANA CODE ANNOTATED - Title 7, chapter 11, part 1; sections 7-5-131 to 7-5-137, 7-11-103, 7-11-104, 7-11-105(6), 7-11-106, 7-33-2104, 7-33-2105, 7-33-2106(2), 7-33-2108, 7-33-4101, 7-33-4112;
MONTANA CONSTITUTION - Article XI, sections 1, 4(2), 7;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 84 (1988), 40 Op. Att'y Gen. No. 17 (1983), 39 Op. Att'y Gen. No. 73 (1982), 39 Op. Att'y Gen. No. 37 (1981), 38 Op. Att'y Gen. No. 87 (1980), 37 Op. Att'y Gen. No. 117 (1978), 37 Op. Att'y Gen. No. 22 (1977), 36 Op. Att'y Gen. No. 4 (1975), 35 Op. Att'y Gen. No. 71 (1974).

HELD: A municipal fire department may not be merged with a rural fire district into a single fire protection agency; however, fire protection services may be provided in a cooperative fashion through an interlocal agreement which city voters may, by initiative, require the governing body of the city to pursue.

February 22, 1990

Jim Nugent
Missoula City Attorney
201 West Spruce
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Dear Mr. Nugent:

You have requested an Attorney General's Opinion on several questions pertaining to the validity of a proposed city initiative which seeks to merge the City of Missoula Fire Department and the Missoula Rural Fire District into a new fire protection agency with an Urban Division and a Rural Division. Although your request includes a number of technical questions, the primary issues are these:

1. Does Montana law permit the merger of a municipal fire department and a rural fire district into a single fire protection agency?
2. If not, is there another method by which fire services may be consolidated or transferred?

3. Is such consolidation a proper subject for the initiative process?

The proposed initiative provides that the Missoula Fire Department and the Missoula Rural Fire District shall merge fire and emergency services through an interlocal agreement whereby current employees of both agencies shall be retained and all facilities shall be utilized in such a way as to provide the most efficient emergency services possible in the greater Missoula area. The measure provides for the creation of a five-member Consolidation Committee to draft and oversee implementation of an interlocal agreement with a three-year phase-in period. The new fire protection agency would be governed and/or advised by a single Fire Commissioners' Board, members of which initially would be appointed by the governing bodies of the merged agencies and subsequently elected. A primary objective of the initiative is to require that the closest available units respond to incidents in all cases, regardless of political boundaries.

Both the City and County of Missoula are local government units with general government powers, and have not been consolidated as allowed by Montana law. See Tit. 7, ch. 3, pts. 11, 12, 13, MCA. Thus, analysis of the proposed initiative must begin with examination of the powers of each unit as a general powers government. The 1972 Montana Constitution adopted the "shared powers" concept for local governments in Montana, and requires that the powers of incorporated cities and towns and of counties be liberally construed. Mont. Const. Art. XI, § 4(2). Nonetheless, if a local government chooses to retain general government powers, the local government has only the powers given to it by the Legislature. D & F Sanitation v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986).

In addition, when the state has exercised a power through its statutes which clearly show [sic] that the state legislature deems the subject matter of the legislation to be a matter of general statewide concern rather than a purely local municipal problem, the city is then without the essential authority or power to pass or adopt any ordinance dealing with that subject matter.

State ex rel. City of Libby v. Haswell, 147 Mont. 492, 495, 414 P.2d 652, 654 (1966). "Where powers of a local government unit are in question, the initial inquiry is whether there is an express grant of such powers. If not, the inquiry becomes whether there is a grant by necessary implication or whether the power is indispensable to the accomplishment of the object of the corporation." 38 Op. Att'y Gen. No. 87 at 301, 302 (1980).

Municipal fire departments are established by state law, which provides:

In every city and town of this state there shall be a fire department, which shall be organized, managed, and controlled as provided in this part.

§ 7-33-4101, MCA. State law further specifies that the chief of the fire department shall have sole command of the department, shall possess full authority to discipline firefighters, and shall be responsible for the engines and other property furnished the fire department. § 7-33-4104, MCA. Under these provisions, "[i]t is clear ... that every city must have a municipal fire department." Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 490, 694 P.2d 1335, 1339 (1985). The Montana Supreme Court has held that the statutory requirement for provision of a municipal fire department is mandatory, even for a city with self-government powers. *Id.*, 214 Mont. at 490-91, 694 P.2d at 1340. Billings Firefighters mandates that the City of Missoula comply with the requirement in section 7-33-4101, MCA, that a municipal fire department be maintained. Further, in view of the fact that the city has only general government powers, State ex rel. City of Libby v. Haswell, *supra*, indicates that Missoula may not adopt any ordinance which conflicts with the provisions of state law concerning the organization, management, and control of municipal fire departments.

The proposed initiative provides for creation of a fire protection agency, the Urban Division of which is to "provide Urban Level fire protection within the city limits of Missoula (in accordance with Montana State Law concerning fire protection requirements for Class I cities)[.]" As in the Billings Firefighters case, although it appears that the intent of the measure is for the City to "continue to provide fire prevention and suppression service," the language of the initiative is unambiguous in that it proposes to supersede a mandatory provision of state law requiring establishment of a municipal fire department. *Id.*, 214 Mont. at 491, 694 P.2d at 1340. The proposal clearly contemplates consolidation of the two fire service units, creating one new entity to govern and control all fire protection services. Under the provisions of the initiative, neither the Rural Fire District nor the Missoula Fire Department would maintain its own identity. Therefore, since the proposed merger would abrogate the Missoula Fire Department as a separate entity, it is my opinion that such a merger would be an invalid exercise of general government powers. Within the framework of the controlling statutes, there is no allowance for the type of consolidation sought by the initiative.

Illustrative of this conclusion is the fact that state law expressly permits the consolidation of a municipal police department with a county sheriff's department to form a department of public safety. See §§ 7-32-101 to 129, MCA. Thus, where such services have been so consolidated, the requirement of section 7-32-4151, MCA, that a police commission be established in all cities and towns is inapplicable. 42 Op. Att'y Gen. No. 58 (1988). These provisions constitute an express grant by the Legislature of authority for cities and counties to consolidate law enforcement services by actually merging each

government unit's department. No such authority is provided for consolidation of fire protection services. The Legislature's explicit provision for consolidation of law enforcement services lends further support to the conclusion that such express authority would be required for the consolidation of fire protection services.

The fact that fire services cannot be merged as contemplated by the initiative does not, however, mean that the objective of cooperative provision of services cannot be achieved. Of course, the fire protection statutes specifically permit the governing body of a municipality to enter into a mutual aid agreement with fire district trustees concerning protection against natural or manmade disasters. § 7-33-4112, MCA. See also § 7-33-2108, MCA.

For more comprehensive provision of services, the City of Missoula could consider an interlocal agreement with the Missoula Rural Fire District. Notwithstanding the proposed initiative's use of the term "interlocal agreement," it in fact provides for a merger, and thus is not a true interlocal agreement as contemplated by state law. Intergovernmental cooperation is permitted by Article XI, section 7 of the Montana Constitution, which provides in pertinent part:

- (1) Unless prohibited by law or charter, a local government unit may
 - (a) cooperate in the exercise of any function, power, or responsibility with,
 -
 - (c) ... one or more other local government units, school districts, the state, or the United States.

The term "local government units" includes, but is not limited to, counties and incorporated cities and towns. Mont. Const. Art. XI, § 1.

Pursuant to this constitutional mandate, the Legislature adopted the Interlocal Cooperation Act, Tit. 7, ch. 11, pt. 1, MCA. Under the terms of the Act:

Any one or more public agencies may contract with any one or more other public agencies to perform any administrative service, activity, or undertaking which any of said public agencies entering into the contract is authorized by law to perform. Such contract shall be authorized and approved by the governing body of each party to said contract. Such contract shall set forth fully the purposes, powers, rights, obligations, and responsibilities of the contracting parties.

§ 7-11-104, MCA. Any such agreement must be submitted to the Attorney General for approval. § 7-11-106, MCA. The Act provides for the creation of

an administrator or joint board responsible for administering the cooperative undertaking. § 7-11-105(6), MCA.

You raise the question whether a rural fire district is a local governmental unit for the purpose of having authority to enter into an interlocal agreement.

In its general sense, the term "local governmental unit" is used to distinguish governmental units of limited regional jurisdiction from state agencies which administer on a state-wide basis. Typical characteristics of any local governmental unit are the delegation of limited powers over a specific, geographically defined region of the state and accountability to a local electorate or other unit of local government.

37 Op. Att'y Gen. No. 22 at 91, 95 (1977). It has been held that a fire district is a political subdivision of the county in which it is located, and thus not a "local governmental unit" per se. 38 Op. Att'y Gen. No. 87 at 301, 302 (1980). Nonetheless, the Interlocal Cooperation Act does not impose a requirement that each contracting party be a "local governmental unit." Rather, it allows such contracts to be entered into between "public agencies," which are defined as "any political subdivision, including municipalities, counties, school districts, and any agency or department of the state of Montana." § 7-11-103, MCA. The list should not be interpreted as exhaustive: "When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A N. Singer, Sutherland Statutory Construction § 47.23, at 194 (4th ed. 1984). In concluding that a municipal housing authority was a "public agency" within the meaning of the Interlocal Cooperation Act, a previous Attorney General's Opinion observed:

The statutory provisions pertaining to interlocal agreements do not include a definition of "political subdivision." However, since the purpose of the interlocal agreement is to allow "political subdivisions" to provide services more efficiently, to the ultimate benefit of the taxpayers and citizens of Montana, a broad definition of the term is clearly appropriate.

39 Op. Att'y Gen. No. 37 at 147, 151 (1981). As noted, a fire district has been held to be a political subdivision. 38 Op. Att'y Gen. No. 87 at 302; 35 Op. Att'y Gen. No. 71 at 173, 174 (1974). It has also been held that fire districts operated by trustees are political subdivisions distinct from counties, and are thus governmental entities within the meaning of the Montana Tort Claims Act. 42 Op. Att'y Gen. No. 84 (1988). Rural fire districts operated by a board of trustees possess all the characteristics of a public agency as that term is used in the Interlocal Cooperation Act. Fire district trustees govern and manage the affairs of the fire district; have the authority to provide firefighting apparatus, equipment, housing, and facilities for the protection of

the district; appoint and form fire companies; and prepare annual budgets. §§ 7-33-2104, 7-33-2105, MCA. Each district has political boundaries, and trustees are elected by electors within the fire district. § 7-33-2106(2), MCA. Based upon the delegation of powers and accountability to a local electorate, it is my opinion that rural fire districts operated by trustees, such as the Missoula Rural Fire District, are political subdivisions within the meaning of the Interlocal Cooperation Act.

You also raise the question whether fire protection is a proper subject for an interlocal agreement. Previous Opinions of the Attorney General have found interlocal agreements appropriate for health services, 35 Op. Att'y Gen. No. 48 at 113, 115-16 (1973); police services, 37 Op. Att'y Gen. No. 117 at 500, 503 (1978); 35 Op. Att'y Gen. No. 72 at 178, 180 (1974); use of jail facilities, 42 Op. Att'y Gen. No. 70 (1988); and cable television franchises, 42 Op. Att'y Gen. No. 87 (1988). Opinions of other state attorneys general have approved the use of interlocal agreements for cooperative fire protection services. *See* Fla. AGO 84-40 (1984); Ky. OAG 77-632 (1977); Miss. AG June 12, 1987 (Opinion to Hon. C. R. Montgomery; interlocal agreement regarding provision of fire protection services permitted so long as not an attempt to contractually modify statutory provisions).

Intergovernmental cooperation has been defined as "an approach or device by which two or more governmental entities work together for a public purpose." 1 E. McQuillin, The Law of Municipal Corporations § 3A.03, at 421 (3d ed. 1987). It is one solution to making government more responsible, efficient, and effective. *Id.* "However, any intergovernmental cooperation on the local level must be voluntary. Essential control of the cooperative action or arrangement must be vested in the elected governing bodies of the units involved. And the identities of the existing units of government must be preserved." *Id.* at 422 (emphasis added).

Montana law encourages local governments to enter into interlocal agreements "and thus share the expenses common to each." 37 Op. Att'y Gen. No. 117 at 503 (1978). An interlocal agreement does not change the status of the employees of the contracting governmental agencies. 36 Op. Att'y Gen. No. 4 at 296, 297 (1975). Thus, employees retain their personal benefits such as vacation leave, sick leave, and retirement. *Id.* at 298. Given the purposes for which the Interlocal Cooperation Act was intended, and provided that any interlocal agreement complies with other mandatory provisions of law, I conclude that the cooperative provision of fire protection services is an appropriate subject for interlocal agreement.

The principal problem with the proposed initiative, viewed in the context of the Interlocal Cooperation Act, is that, as already noted, it would not only create a new legal entity but would abolish two other public entities, one of which is mandated by state law. It is important to recognize that the Act does not confer any additional powers on the cooperating agencies; it merely

provides for their joint exercise. See § 7-11-104; 40 Op. Att'y Gen. No. 17 at 63, 68 (1983). The initiative errs in assuming that the City of Missoula has the power to legislate a fundamental change in the structure and administration of its fire department. So long as the separate identities of the two governmental units are preserved, creation of a joint board for administration of the interlocal agreement is permissible, but replacing the fire department and fire district with a single agency is not.

Finally, addressing the third inquiry, interlocal agreements may be accomplished by demand of the voters. The Constitution allows the qualified electors of a local government unit to require, by initiative or referendum, that the local government cooperate with another local government unit in the exercise of any function. Mont. Const. Art. XI, § 7. Sections 7-5-131 to 137, MCA, set forth the procedures by which electors of local government units may exercise the powers of initiative and referendum. You question whether the consolidation of fire protection services is an appropriate subject for the initiative process. It is a general rule that "all matters in which the voters have an interest are subject to the referendum and that statutes in aid of these reserved powers should be liberally construed." 39 Op. Att'y Gen. No. 73 at 278, 281 (1982). By statute, however, the powers of initiative do not extend to:

- (a) the annual budget;
- (b) bond proceedings, except for ordinances authorizing bonds;
- (c) the establishment and collection of charges pledged for the payment of principal and interest on bonds; or
- (d) the levy of special assessments pledged for the payment of principal and interest on bonds.

§ 7-5-131, MCA. In addition, it has been held that the initiative and referendum procedures apply to legislative actions but not to acts that are administrative in character. 39 Op. Att'y Gen. No. 73 at 280. The Montana Supreme Court has held:

The initiative and referendum apply only to matters of general legislation, in which all the qualified electors of the city are interested, and not to matters of purely local concern such as the creation of a special improvement district, in which only the inhabitants or property owners are interested.

Allen v. City of Butte, 55 Mont. 205, 208, 175 P. 595, 596 (1918) (followed in 39 Op. Att'y Gen. No. 73 at 281-82).

In my opinion, a city initiative to require the governing body of the city to pursue an interlocal agreement with a rural fire district for cooperative provision of services is a proper utilization of the initiative process. Although it may have a fiscal impact, such an initiative would not affect the annual budget directly so as to be proscribed by section 7-5-131(2)(a), MCA. Further, notwithstanding any argument that the cooperative provision of fire protection services is an administrative act, the constitution's express permission of use of the initiative to require such interlocal agreements overrides any potential statutorily or judicially created roadblocks. Mont. Const. Art. XI, § 7. The transcript of the 1972 Constitutional Convention supports this conclusion. The Committee Report on Article XI, section 7, shows that the section was intended to be a complete grant of authority to all local government units to cooperate in the exercise of powers and functions, share the services of officers, and transfer functions and responsibilities to other units of government. II Mont. Const. Conv. at 798-99 (1972). During the floor debate on this section, Delegate Blend stated:

The section specifically makes it clear that the people, through an initiative and referendum measure, may force their local government to cooperate if government itself does not take it upon itself to arrive at these conclusions.

VII Mont. Const. Conv. at 2535 (1972). Accordingly, I conclude that the electors of the City of Missoula could, by initiative, require the city to pursue an interlocal agreement with the Missoula Rural Fire District regarding the cooperative provision of fire protection services, within the confines of other mandatory provisions of law.

In summary, it is my opinion that although the City of Missoula Fire Department and Missoula Rural Fire District may not be merged by initiative into a single fire protection agency, the cooperative provision of fire protection services may be achieved by interlocal agreement, subject to approval of the Attorney General under section 7-11-106, MCA. I do not consider the issue whether an initiative for interlocal agreement would be appropriate within a rural fire district, because it appears that in this instance the fire district is willing to enter into a cooperative arrangement and therefore resolution of that issue is not necessary to the disposition of your request.

Having reached these conclusions, I find it unnecessary to address the remaining questions contained in your request.

THEREFORE, IT IS MY OPINION:

A municipal fire department may not be merged with a rural fire district into a single fire protection agency; however, fire protection services may be provided in a cooperative fashion through an interlocal

agreement which city voters may, by initiative, require the governing body of the city to pursue.

Sincerely,

MARC RACICOT
Attorney General