November 6, 1939.

Montana Milk Control Board
The Capitol

Gentlemen:

You have submitted the question whether the State of Montana, in the purchase of milk for its state institutions, which are within a designated market area of the Montana Milk Control Board, is subject to the provisions of Chapter 204, Laws of 1939, being an Act creating the Milk Control Board to supervise and regulate the milk industry of the state. You call attention to clause 11 of Section 3 of the Act, which reads:

> "'Consumer' means any person or any agency, other than a dealer, who purchases milk for consumption or use."

and ask whether the word "agency" applies to state institutions. In brief, the question presented is whether the State of Montana is bound by the provisions of this Act. The answer to this question depends upon the intention of the legislature in enacting it.

Unless it is clear from the Act itself that the state is bound thereby, it is not bound by it for it is a general rule that the state is not bound by the general words of a statute, which, if applied, would operate to trench on its sovereign rights, injuriously affect its capacity to perform its functions or establish a right of action against it, unless the contrary is expressly declared or necessarily implied.

The Supreme Court of Montana, in the case of In re Beck's Estate, 44 Mont. 461, 574, 121 Pac. 784, speaking by Chief Justice Brantly, said:

> "The purpose of legislation is to prescribe rules to regulate the conduct, and protect and control the rights, of the citizens. Therefore, the rules to be observed in the construction of statutes is, that the state is not included by general words therein creating a right and providing a remedy for its enforcement. In United States v. Hoar, 2 Mason, 314, Fed. Cas. No. 15,373, 26 Fed. Cas. 329, Mr. Justice Story said on this subject: 'In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens;

Opinion No. 159.

Montana Milk Control Board—State Purchasing Agent—State Institutions—Supplies—Statutes—Construction.

HELD: The State of Montana is not bound by the provisions of the Act creating the Milk Control Board, and the State Purchasing Agent is required to purchase milk for state institutions from the lowest responsible bidder, in accordance with Section 293.3.

and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the Act." (See cases cited.)

Later, in Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 170 Pac. 760, the Court again said:

"* * * the rule—accepted universally we believe—is that the sovereign authority is not bound by the general language of a statute which tends to restrain or diminish the powers, rights or interests of the sovereign."

The Court cited United States v. Herron, 20 Wall. (U. S.) 251, 22 L. Ed. 275; Guaranty Title & Trust Co. v. Title Guaranty & S. Co., 224 U. S. 152, 155, 56 L. Ed. 706, 32 Sup. Ct. Rep. 457.

The rule was again recognized in City of Billings v. Public Service Commission, 67 Mont. 29, 214 Pac. 608. See also 2 Sutherland on Statutory Construction, 953, Kuback Co. v. McGuire (Cal.), 248 Pac. 677; State Land Board v. Campbell (Ore.), 13 Pac. (2) 346; Morris v. State (Okla.) 212 Pac. 588; State v. City of Milwaukee (Wis.), 129 N. W. 1101; State v. City of DesMoines (Iowa), 266 N. W. 41.

Applying this general rule, we must turn to the language of the statute to determine whether the contrary is expressly declared or implied. The word "agency" in the text above quoted, whether used in its broadest sense, which includes every relationship in which one person acts for or represents another, or in the restricted sense to describe the relation resulting where one person authorizes another to act for him in business dealings with others (2 C. J. S., Agency, 1023, Sec. 1; 2 Am. Jur., Agency, 13, Sec. 1), does not expressly include the sovereign. Nor do we find any language in the Act which expressly or by necessary implication includes the state. By the use of general words, the state is not included.

"The general words of a statute do not include the government or affect its rights unless the construction be clear and undisputed upon the text of the Act."

Nardone v. United States, 302 U. S. 379, 82 L. Ed. 314, 317.

Section 293.3, R. C. M., 1935, provides:

"The state purchasing agent in making purchase of supplies and equipment under the provisions of this act, or under the laws of the State of Montana, must advertise as hereinafter provided, and award contracts in the name of the State of Montana for such supplies and equipment to the lowest responsible bidder, except as hereinafter provided."

If the legislature had intended to include the state, this section and related sections found in Chapter 26 of the Political Code, Laws of 1935, should have been repealed. This was not done. The rule that repeals by implication are not favored is too well known to require citation of authority.

It has been the practice for years for the State of Montana to purchase supplies for a price lower than the retail price paid by the individual consumer. It is a part of the general state economy in order to save the taxpayer. It is well known that such practice was not an evil which caused the enactment of this Act. The purpose of the law, as stated in Section 2 "is to protect and promote public welfare and to eliminate unfair and demoralizing trade practices in the fluid milk industry." These "demoralizing trade practices" were not related to the policy of state economy. This policy expressed in Section 293.3, supra, which has resulted in a saving of large sums to the taxpayers, should not be set aside except by the clear and express will of the legislature. Compare opinion of this office to the Purchasing Agent, May 11, 1937, Volume 17, Opinions of the Attorney General, 108, wherein we express the view that Chapter 80, Laws of 1937, relating to unfair competition and discrimination, and Chapter 42 Id., relating to trade mark products, do not amend the law requiring the State Purchasing Agent to award contracts to the lowest responsible bidder. We were there considering the purchase of trucks and commercial cars. The same

principles apply and we see no reason for departing from the opinion there expressed.

It is therefore my opinion that the State of Montana is not bound by the provisions of the Act creating the Montana Milk Control Board and that the State Purchasing Agent is required to purchase milk for state institutions in accordance with the provisions of Section 293.3, that is, to award contracts to the lowest responsible bidder.