VOLUME NO. 42 OPINION NO. 21

EDUCATION, HIGHER - Effect of Initiative No. 105 and 1987 Montana Laws, chapter 654 on community college funding mechanisms;
INITIATIVE AND REFERENDUM - Authority of Legislature to enact amendments to voter-initiated statute;
MOTOR VEHICLES - Applicability of Initiative No. 105 and 1987 Montana Laws, chapter 654 to taxation of;
SPECIAL IMPROVEMENT DISTRICTS - Applicability of Initiative No. 105 and 1987 Montana Laws, chapter 654 to assessments or tax levies by;
STATUTES - Authority of Legislature to enact amendments to voter-initiated statute;
STATUTES - Whether Initiative No. 105 and 1987 Montana Laws, chapter 654 impliedly repealed statutory mill levy limitations or modified various statutory obligations;

TAXATION AND REVENUE - Applicability of Initiative No. 105 and 1987 Montana Laws, chapter 654 to assessments or tax levies imposed by irrigation districts or other special improvement districts;
TAXATION AND REVENUE - Effect of Initiative No. 105 and 1987 Montana Laws, chapter 654 on taxing unit's authority to increase individual taxpayers' property tax liability even if statutorily-prescribed or voter-approved mill levy limits are not exceeded;
MONTANA CODE ANNOTATED - Title 7, chapter 12, parts 21, 41; Title 15, chapter 6, part 1; sections 7-1-114, 7-6-2501, 7-6-2531, 7-6-4431, 7-6-4452, 7-12-1133, 7-12-4611, 7-13-2406, 7-14-202, 7-22-2222, 15-6-138, 15-6-140, 15-7-122, 20-15-311, 20-15-312, 61-1-105, 61-1-129 to 61-1-131, 61-1-133, 61-3-531, 85-7-2103, 85-7-2104;
MONTANA CONSTITUTION - Article III, section 4; article XI, section 4;
MONTANA LAWS OF 1987 - Chapters 211, 291, 654;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 14 (1987), 42 Op. Att'y Gen. No. 16 (1987).

HELD: 1. SB 71 is a valid amendment to I-105 and controls in cases of conflict.

2. I-105 and SB 71 do not limit the ability of irrigation districts to raise their water assessment rates.

3. I-105 and SB 71 do not prohibit the implementation of 1987 Montana Laws, chapter 211.

4. Section 2(7) of SB 71 does not repeal the statutory mill levy limitations or amend by implication statutes mandating taxing units to perform various duties.

5. Community college trustees and the Board of Regents may not budget an amount for the colleges' total unrestricted budgets which will increase an individual taxpayer's property tax liability over his 1986 tax year amount unless otherwise permitted to do so by SB 71.

6. I-105 and SB 71 supersede tax levies approved by local governments or by local voters to the extent the levies increase an individual taxpayer's property tax liability to a particular taxing unit over his 1986 tax year amount unless otherwise permitted to do so by SB 71.

7. Taxing units which levied lower than normal or than authorized taxes in 1986 may not increase the actual property tax liability of a taxpayer unless otherwise permitted to do so by SB 71.

8. Applicability of the exception contained in section 2(7) of SB 71 must be determined anew each year with reference to the taxable valuation of the previous year.

9. I-105 and SB 71 do not alter local government budget- or election-procedure laws.

5 August 1987

Thomas J. Sheehy
Chouteau County Attorney
Chouteau County Courthouse
Fort Benton MT 59442

Richard A. Simonton
Dawson County Attorney
Dawson County Courthouse
Glendive MT 59330

Daniel L. Schwarz
Powder River County Attorney
Powder River County Courthouse
Broadus MT 59317

John W. Robinson
Ravalli County Attorney
Ravalli County Courthouse
Hamilton MT 59840

Russell R. Andrews
Teton County Attorney
Teton County Courthouse
Choteau MT 59422

William A. Schreiber
Belgrade City Attorney
P.O. Box 268
Belgrade MT 59714

Douglas D. Howard
Town Attorney
Town of Columbus
Columbus MT 59019

Gentlemen:

You have requested my opinion on various aspects of Initiative No. 105 (I-105) and 1987 Montana Laws, chapter 654 (SB 71). I have taken the liberty of rephrasing and grouping your questions as follows:

1. Whether SB 71 is a valid amendment to I-105 and controls in cases of conflict.

2. Whether an irrigation district may raise its water assessment rate under the provisions of SB 71.

3. Whether I-105 and SB 71 prohibit the implementation of 1987 Montana Laws, chapter 611, which replaces fees in lieu of tax on various items of property with a property tax.

4. Whether section 2(7) of SB 71 amends or repeals by implication statutory mill levy limitations.

5. Whether I-105 and SB 71 amend by implication statutes that require taxing units to perform various duties.

6. Whether I-105 and SB 71 amend by implication the statutory mechanisms established for funding community colleges.

7. Whether I-105 and SB 71 supersede special tax levies approved by local voters.

8. Whether a taxing unit may increase a taxpayer's property tax liability over the amount actually paid in the 1986 tax year if the increase is based upon a mill levy approved by voters for the 1986 tax year.

9. Whether a taxing jurisdiction which raises its mill levy pursuant to section 2(7) of SB 71 can consider that higher mill levy as a base for future years.

10. Whether I-105 and SB 71 are intended to modify general local government budget- and election-procedure laws.

I will address your questions in the order in which they are listed above.

I.

The first question deals with the validity of any amendments to I-105 effected by SB 71. In 1920 the Montana Supreme Court, construing the 1889 Montana Constitution, unequivocally upheld the Legislature's authority to modify voter-initiated acts:

> The attorney general suggests that a law initiated by the people cannot be withdrawn from its peculiar position by an amendment by the legislature, no matter what the circumstances, but that in the case of all initiated Acts the people have the right to the ultimate determination of whether or not the amendments shall be adopted. This suggestion is without merit.
>
> Prior to the adoption of the initiative and referendum amendment to our Constitution, the people of the state, in whom, originally, all power is vested, had delegated to their representatives, the legislative body, the exclusive authority to make laws for the government of the state, subject only to such restrictions as were found in the Constitution and the exercise of the executive veto. By the adoption of the amendment the people did no more than recall that exclusive authority, and reserve to themselves the power to propose laws, and to accept or reject them at the polls, on any subject, save those subjects enumerated in the excepting clauses contained in the amendment. Thereafter, on those subjects not excepted, either the people or the legislature may act at will--their power is coextensive; when an Act is passed by either method, it becomes the law of the state, no more and no less. "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as are other statutes, and may be amended or repealed by the legislature at will."

State ex rel. Goodman v. Stewart, 57 Mont. 144, 150-51, 187 P. 641, 643 (1920). See also Cottingham v. State Board of Examiners, 134 Mont. 1, 12-13, 328 P.2d 907, 913 (1958). I find nothing in either the language or

the convention transcripts of the 1972 Montana Constitution that indicates any intent to adopt a new constitutional standard in this area. Mont. Const. art. III, § 4; VII Montana Constitutional Convention 2695-2717 (1981); 1A N. Singer, Sutherland Statutory Construction § 22.06 (4th ed. 1985).

In enacting SB 71, the Montana Legislature showed every awareness of its ability to amend I-105 and used that ability. An example of this, relevant to several of the present questions, concerns the situation in which a taxing unit's assessed valuation has dropped 5 percent or more from the previous tax year. Section 2(7) of SB 71 allows governing officials of a taxing unit confronted with such a reduction to increase the amount of taxes levied on a particular piece of property above those paid in 1986. To the extent of any conflict with I-105, section 2(7) of SB 71 controls. The Legislature's awareness of its authority is also implicitly reflected in the statement of legislative intent prefacing SB 71. In the second section of that statement, the Legislature recognized that it must provide many details consistent with the general intent of I-105, while, in the statement's final section, the Legislature emphasized its duty to reconcile the property tax limitation purpose of SB 71 with the need "to enable the Department of Revenue and local government units to function smoothly under such limits."

II.

I have been asked several questions about the applicability of I-105 and SB 71 to such things as irrigation districts and motor vehicles (1987 Mont. Laws, ch. 611). These questions must be resolved by determining (1) whether a property tax rather than a special assessment is involved and (2) whether, if a property tax, it is levied against property described in Title 15, chapter 6, part 1, MCA. See 1987 Mont. Laws, ch. 654, § 2(1).

Section 2(2) of I-105 specifically excludes from its scope levies by rural and special improvement districts established under Title 7, chapter 12, parts 21 and 41, MCA. Section 2(8) of SB 71 expands these exclusions to, inter alia, city street maintenance districts. The difficult issue is whether the exclusions are intended to constitute the only exceptions from I-105 and SB 71 coverage for taxing units whose levies are properly classified as assessments or fees and not property taxes. Application of the statutes to such taxing units

appears anomalous because the amount of their assessments or tax levies is not predicated on a specific mill levy amount or, typically, on the assessed valuation of the property within their jurisdictions. Moreover, the assessments are not even properly characterized as property taxes but, rather, closely approximate user fees. Because the overall structure of I-105 and SB 71 manifests a general intent to regulate only increases in the amount of an individual's property tax derived from application of mill levy and assessed valuation factors, I conclude, as more fully explained below, that irrigation districts and like special districts, whose assessments and tax levies are based on the value of services actually rendered to a particular piece of property, are taxing units excluded from coverage under I-105 and SB 71.

The distinction between a property tax and a special assessment was explained in Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957):

> A tax is levied for the general public good. It creates a lien. An assessment is imposed against specific property to defray the cost of a specific benefit to the property, the benefit to be commensurate with the assessment.

See generally Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622-23 (1981) ("'A tax is not an assessment of benefits. It is ... a means of distributing the burden of the cost of government'"); 70A Am. Jur. 2d Special or Local Assessments § 2 (1987) ("a special assessment is ordinarily levied wholly on benefits"). To the extent a particular charge is predicated on the benefit actually received by a particular taxpayer within a special district, therefore, it is not a property tax and not subject to I-105 and SB 71. This distinction is consistent with those statutes' purposes since any other result would serve only to confer a focused benefit on a given taxpayer's property without a corresponding obligation to pay for that benefit. I-105 and SB 71, however, are clearly aimed at limiting the use of property taxes as a means for subsidizing general government services whose costs are apportioned not on the basis of the value of services actually received but solely on the basis of the taxpayer's property assessment valuation.

The distinction between taxes and assessments is particularly germane to irrigation districts which have long been recognized as public corporations. See 42 Op. Att'y Gen. No. 14 (1987). Revenue necessary for an

irrigation district's operations is raised through, inter alia, special assessments and annual tax levies whose amount as to a specific taxpayer is predicated not on the value of his property but either on the proportion of a particular tract's irrigable acreage to the district's total irrigable acreage or, in some situations, on a basis intended to more directly relate the charge to the actual benefit received. See §§ 85-7-2103, 85-7-2104, MCA. Under no circumstances, though, is the levy predicated simply on the value of the involved property. Unquestionably, irrigation district special assessments or annual tax levies are not property taxes and are unrestricted by I-105 and SB 71.

Other special district levies may similarly be classified as assessments and not property taxes, e.g., § 7-13-2406, MCA (garbage and ash collection districts). In each instance whether a special district's levy is appropriately characterized as a property tax or an assessment must be decided in accordance with the general principle stated in Vail. The central inquiry will thus normally be whether the purpose of the levy or assessment is to compensate the district for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits; i.e., whether the levy is in the nature of a user fee. Ordinarily this determination should not be complex. Compare § 7-14-232, MCA (urban transportation districts), and § 7-22-2222, MCA (rodent control districts), with § 7-12-1133, MCA (business improvement districts), and § 7-12-4611, MCA (fire hydrant maintenance districts).

1987 Montana Laws, chapter 211, replaced the fee in lieu of tax on light vehicles with a property tax. As developed above, though, I-105 and SB 71 apply only to property described in Title 15, chapter 6, part 1 of the Montana Code Annotated. 1987 Mont. Laws, ch. 654, § 2(1). The vehicles subject to 1987 Montana Laws, chapter 211, are described in section 61-3-531, MCA (light vehicles), section 61-1-105, MCA (motorcycles), section 61-1-133, MCA (quadricycles), section 61-1-130, MCA (motor homes), section 61-1-131, MCA (travel trailers), and section 61-1-129, MCA (campers), and are mentioned in Title 15, chapter 6, part 1, MCA, only as exceptions. §§ 15-6-138(d), 15-6-140(e), MCA. Consequently, the provisions of I-105 and SB 71 are inapplicable to such items of personal property.

III.

The third set of questions concerns the amendment or repeal by implication of other statutes by either I-105 or SB 71. Amendment or repeal by implication is not favored in Montana. Dolan v. School District No. 10, 195 Mont. 340, 346, 636 P.2d 825, 828 (1981). State ex rel. Mallott v. Board of Commissioners, 89 Mont. 37, 76, 296 P. 1, 11 (1930). The Montana Supreme Court has set the following standards for implied repeals:

> We have said of implied repeals, in Box v. Duncan, 98 Mont. 216, 38 P.2d 986, 987: "To make tenable the claim that an earlier statute was repealed by a later one, the two acts must be plainly and irreconcilably repugnant to, or in conflict with, each other; must relate to the same subject; and must have the same object in view."

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Bennett, 145 Mont. 191, 195, 399 P.2d 986, 988 (1965). Thus, this and other cases establish a three-part test for repeal by implication: (1) The two acts must relate to the same subject; (2) the two acts must have the same object in view; and (3) the two acts must be plainly and irreconcilably in conflict. All three parts of the test must be met.

Several questions inquire about the relationship of I-105 and SB 71 to various statutes governing local mill levies. Specifically, they ask whether the new laws amend or repeal by implication the various mill levy limitations contained in such statutes as sections 7-6-2501 and 7-6-4452, MCA. I-105, SB 71, and these groups of statutes relate to the same subject--taxation. However, the objects of I-105 and SB 71 are not the same as those of the mill levy limit provisions. I-105 and SB 71 create a statutory structure whose object is, with certain exceptions, "that no further property tax increases be imposed." Statutory mill levy limitations, in contrast, have as their sole purpose restricting the amount of millage a taxing unit may ever levy. See Minutes of the Montana House Local Government Committee, March 6, 1987, at 7-10; Minutes of the Montana Senate Local Government Committee, January 22, 1987, at 3-5. Moreover, because mill levies are only one of the two components used to determine a taxpayer's property tax liability, those levies may theoretically increase without violation of I-105 and SB 71 if the second component, assessed value, decreases; millage may nonetheless never rise above statutorily-prescribed limits irrespective of the degree to which assessed

value is diminished, and it is possible for such limits to restrict property tax revenues more than I-105 and SB 71 do.

Applying the third part of the implied repeal test, I believe these statutes can be reconciled. The exception in section 2(7) of SB 71 allows the governing body of a taxing unit to increase the amount of taxes levied on an individual taxpayer to compensate for a reduction of 5 percent or more in the unit's total assessed valuation from the previous tax year. This may be done without a public vote. SB 71 shows no clear intent, however, to permit statutory mill levy limitations to be exceeded. When the amount of taxes levied pursuant to section 2(7) will exceed the statutory mill levy limitations, some further authority to exceed these mill levy limitations--such as, for example, sections 7-6-2531, 7-6-4431, or 15-7-122, MCA--must be present. I conclude that I-105 and SB 71 do not amend or repeal by implication statutes limiting the total amount of mill levies.

A similar result is reached when the implied repeal test is applied to statutes which mandate performance of certain duties by a taxing unit. The only difference is that, in the case of a taxing unit's statutorily mandated duties, neither the subject of nor the objects sought by the two sets of acts is the same. Local officials may necessarily have to reduce discretionary projects in order to perform duties that are statutorily required, but that was the case before I-105 or SB 71 and it remains so now.

A final question on implied repeal concerns the funding of community colleges. During the 1987 legislative session, the State's share of community college funding was reduced from 51 percent of the total audit cost to 49 percent. This calls for a commensurate increase in the local contribution. Under the community college funding formula, an estimate of revenues is made from the moneys generated by student tuition, student fees, other income or credit balances and the state general fund appropriation. This estimate of revenues is subtracted from the community college's total unrestricted budget, and the difference is obtained from a mandatory levy on the community college district. §§ 20-15-311, 20-15-312, MCA.

Aside from the implied repeal test, the Supreme Court's injunction that "statutes which are not inconsistent with one another, and which relate to the same subject matter, are in pari materia and should be construed together, and effect given to both if it is possible to

do so" must be considered in reconciling the requirements of I-105 and SB 71 with those controlling community college funding. State ex rel. Riley v. District Court, 103 Mont. 576, 583, 64 P.2d 115, 118 (1937). Thus, (1) I-105 and SB 71 generally limit the amount of property taxes capable of assessment upon an individual taxpayer to the 1986 tax year level; (2) the board of trustees of a community college and the board of regents must adopt a budget which, under section 20-15-312, MCA, will not result in an increase in the mandatory levy as to a particular taxpayer over 1986 amounts; and (3) the frozen mandatory levy must now account for 51 percent of the community college's total unrestricted budget. The regents and the community college trustees must consequently either reduce the community college budgets or find alternative sources for funds beyond those generated by the mandatory levy.

IV.

I have received several questions concerning the relationship of I-105 and SB 71 to items such as local ordinances or ballot measures. Before directly responding to these questions, I must emphasize the unique nature of local governments with self-government powers. D & F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 80, 713 P.2d 977, 981 (1986); Billings Firefighters Local 521 v. City of Billings, 42 St. Rptr. 112, 694 P.2d 1335 (1985); 42 Op. Att'y Gen. No. 16 (1987). Those governments are generally subject to I-105 and SB 71, but they are specifically exempted from mill levy limitations. § 7-1-114(1)(g), MCA.

Neither local governments with self-government charters nor local governments with general government powers, however, have the power to act so as to modify I-105 and SB 71's application to them. In the case of local governments with self-government powers, section 7-1-114(1)(g), MCA, prevents them from acting to amend I-105 and SB 71. In the case of local governments retaining general government powers, they have only those powers provided or implied by law, and the power to act so as to amend initiatives or statutes has not been provided. Mont. Const. art. XI, § 4; D & F Sanitation Service v. City of Billings, 43 St. Rptr. at 79, 713 P.2d at 982. I accordingly conclude that where a taxing unit purports to increase the amount of an individual taxpayer's property tax for tax years commencing after December 31, 1986, other than as specifically allowed under SB 71, such action is void. This prohibition applies even if the increase was sanctioned by voter approval.

V.

A somewhat similar situation exists where the taxing unit was established before 1986, and, because the unit carried a budget surplus into 1986, it levied an amount of taxes significantly lower than normal. Is the taxing unit limited to the reduced levy assessed in 1986, even if that levy is significantly lower than that approved by the voters in 1986? SB 71 clearly answers this question: "[A] taxpayer's liability may not exceed the dollar amount due in each taxing unit for the 1986 tax year" except under specified and highly restricted circumstances. The Legislature has nevertheless provided in section 2(9) of SB 71 a procedure for increasing the amount of taxes levied for those taxing units which, because of an abnormally low tax levy in 1986, are now faced with a financial emergency. Without compliance with that procedure, the property tax amount--even though abnormally low in 1986--may not be increased. For the same reason, a taxing unit, like a school district, may not increase a taxpayer's property tax liability even though the taxes actually levied for the 1986 tax year were less than permissible under voter-approved mill levy amounts.

VI.

The ninth question requires analysis of section 2(7) of SB 71. That section provides an exception to the general prohibition against increasing an individual taxpayer's liability to a particular taxing unit over that of the 1986 tax year if "the tax unit's taxable valuation decreases by 5% or more from a previous tax year." Should such a decrease occur, additional mills may, within otherwise applicable millage limitations, be levied and the individual taxpayer's liability increased over the 1986 tax year amount; under no circumstances, however, may the total revenue to the taxing unit from property taxes exceed that for the 1986 tax year. Importantly, the exception in section 2(7) is not continuing in nature; i.e., if in the next tax year assessed valuation does not decrease by 5 percent or more, the individual taxpayer's liability to a taxing unit may not exceed the 1986 tax year amount irrespective of the number of mills levied. I recognize that this interpretation of section 2(7) may cause hardship to taxing units which have, for example, suffered a significant reduction in assessed valuation between the 1986 and 1987 tax years and then experience a modest increase or slight decrease between the 1987 and 1988 tax years. Nonetheless, it is not my prerogative to alter the meaning of an otherwise clear

statutory provision; any modification required to ameliorate the effect of a long-term diminution of assessed valuation must be legislatively made.

VII.

A final group of questions concerns the effect of I-105 and SB 71 on local government budget- and election-procedure laws. First, I find nothing in the language or legislative history of I-105 and SB 71 to indicate any intent to alter the existing legal authority and duties of taxing jurisdiction officials to administer the finances of those jurisdictions. The legislative history of the recently-adopted, all-purpose levy for counties is most persuasive in this regard. See 1987 Mont. Laws, ch. 291. Second, I find nothing in section 2(9) of SB 71 reflecting an intent to establish any standards for the special elections described therein other than those established by existing state law.

THEREFORE, IT IS MY OPINION:

1. SB 71 is a valid amendment to I-105 and controls in cases of conflict.

2. I-105 and SB 71 do not limit the ability of irrigation districts to raise their water assessment rates.

3. I-105 and SB 71 do not prohibit the implementation of 1987 Montana Laws, chapter 211.

4. Section 2(7) of SB 71 does not repeal the statutory mill levy limitations or amend by implication statutes mandating taxing units to perform various duties.

5. Community college trustees and the Board of Regents may not budget an amount for the colleges' total unrestricted budgets which will increase an individual taxpayer's property tax liability over his 1986 tax year amount unless otherwise permitted to do so by SB 71.

6. I-105 and SB 71 supersede tax levies approved by local governments or by local voters to the extent the levies increase an individual taxpayer's property tax liability to a particular taxing unit over his 1986 tax year amount unless otherwise permitted to do so by SB 71.

7. Taxing units which levied lower than normal or than authorized taxes in 1986 may not increase the actual property tax liability of a taxpayer unless otherwise permitted to do so by SB 71.

8. Applicability of the exception contained in section 2(7) of SB 71 must be determined anew each year with reference to the taxable valuation of the previous year.

9. I-105 and SB 71 do not alter local government budget- or election-procedure laws.

Very truly yours,

MIKE GREELY
Attorney General