VOLUME NO. 43 OPINION NO. 46

PROPERTY, REAL - Applicability of property tax limitations to water and sewer district assessment levies;
TAXATION AND REVENUE - Applicability of property tax limitations to water and sewer district assessment levies;
WATER AND SEWER DISTRICTS - Applicability of property tax limitations to assessment levies;
MONTANA CODE ANNOTATED - Sections 7-13-2301 to 7-13-2303, 15-10-401 to 15-10-412, 15-10-402, 15-10-412, 76-15-515, 76-15-623;
MONTANA LAWS OF 1989 - Chapter 662;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 73 (1988), 42 Op. Att'y Gen. No. 21 (1987);
REVISED CODES OF MONTANA, 1947 - Section 16-4524.

HELD: The property tax limitations in sections 15-10-401 to 412, MCA, apply to assessment levies pursuant to section 7-13-2302, MCA, by a water and sewer district for the purpose of repaying a general loan obligation even if such district has never previously exercised its levy authority under that provision.

December 7, 1989

Thomas R. Scott
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Dear Mr. Scott:

You have requested my opinion concerning the following question:

> Do the property tax limitations in sections 15-10-401 to 412, MCA, apply to a water and sewer district which, although formed in 1971, has never utilized its levy authority under section 7-13-2302, MCA, where the proposed levy will be used to repay a federal loan?

I conclude that water and sewer district levies under section 7-13-2302, MCA, to satisfy expenses of the kind involved here do constitute property taxes within the scope of sections 15-10-401 to 412, MCA, and that the limitations in those provisions apply to any such district created prior to 1986 even though it has never previously utilized its levy authority.

The Beaverhead County Water and Sewer District serving Wisdom, Montana was created in 1971. Since formation it has relied exclusively on income from water user service charges fixed pursuant to section 7-13-2301, MCA, to

finance its operations. The district's board of directors, however, has recently determined that use of an assessment levy pursuant to section 7-13-2302, MCA, is necessary to meet federal loan repayment obligations. There is no indication that the expenses of the loan repayment can be segregated on the basis of specific benefits conferred upon particular parcels of property as opposed to the district as a whole. The instant issues are thus whether such a levy would constitute a property tax within the scope of Initiative No. 105 (codified at sections 15-10-401 and 15-10-402, MCA) and the clarifying legislation contained in sections 15-10-411 and 15-10-412, MCA, and, if so, whether the limitations in those provisions apply to a taxing unit which, while in existence prior to tax year 1986, has never used its levy authorization powers. I note that the proposed use of the income from the levy is unrelated to the payment of principal or interest on bonded indebtedness and that applicability of the exception in section 15-10-412(8)(c), MCA, for "levies pledged for the repayment of bonded indebtedness" need not be considered.

Water and sewer districts are authorized to finance their activities through service charges and assessment levies. §§ 7-13-2301, 7-13-2302, MCA. Service charge amounts derive from the sale and distribution of water to the district's users (§ 7-13-2301(1), MCA) and, as a general matter, are based upon rates which "will pay the operating expenses of the district" (§ 7-13-2301(2), MCA). Assessment levies may be utilized "[i]f from any cause the revenues of the district shall be inadequate to pay the interest or principal of any bonded debt as it becomes due or any other expenses or claims against the district[.]" § 7-13-2302(1), MCA. The amount of the levy with respect to a particular parcel of land must be predicated on either the ratio of such parcel's acreage to the total assessed acreage or the ratio of the parcel's taxable valuation to the total valuation of assessed lands. § 7-13-2303(1), MCA. Water and sewer districts should thus ordinarily attempt to discharge their financial obligations through service charges and resort to assessment levies only when revenues from user fees are insufficient to satisfy outstanding debts and provide suitable cash reserves. It is also clear that assessment levy amounts need not be related to the actual benefit conferred upon a particular parcel of property by the district, since neither the parcel's relative size nor its relative taxable valuation is necessarily an accurate measure of such benefit.

In 42 Op. Att'y Gen. No. 73 (1988), Attorney General Greely held that regular and special assessments by conservation districts under sections 76-15-515 and 76-15-623, MCA, were properly characterized as taxes subject to the property tax limitations in sections 15-10-401 to 412, MCA. The individual taxpayer's liability under either form of assessment was predicated upon the property's taxable valuation. The controlling consideration in that opinion was whether the levies were intended "'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[.]'" *Id.*, slip op. at 3 (quoting from 42 Op. Att'y Gen. No. 21 (1987)). Because no direct correlation existed between the amount of the assessment and the value of the benefit bestowed on the

assessed property, conservation district levies were deemed taxes subject to the limitations.

42 Op. Att'y Gen. No. 73 governs presently with respect to the first issue. As developed above, a water and sewer district board of trustees is required under section 7-13-2301(2), MCA, to establish water service rates sufficient to pay the district's expenses, and an assessment levy under section 7-13-2302, MCA, is appropriate only when the service charges are inadequate to satisfy the district's expenses. The levy is assessed on the basis of proportional land size or valuation and without reference to whether the amount taxed bears a direct relationship to the benefit specially conferred on the particular taxpayer's property. In this respect, water and sewer districts are therefore situated almost identically to conservation districts.

I am aware that Parker v. County of Yellowstone, 140 Mont. 538, 374 P.2d 328 (1962), apparently construed a levy under section 16-4524, R.C.M. 1947, the predecessor provision to section 7-13-2302, MCA, to be an assessment and not a tax. There the Montana Supreme Court confronted a claim that section 16-4524, R.C.M. 1947, was unconstitutional because it delegated to a water and sewer district the power to tax without regard to the benefits conferred on the taxed property. The Court rejected this claim, concluding that the evidence supported the district court's finding that all property within the district would be benefited by at least the amount planned to be expended. 140 Mont. at 544-46, 374 P.2d at 331-32. I do not construe Parker, however, as standing for the proposition that all levies under section 7-13-2302, MCA, are properly viewed as special assessments. The contrary would seemingly be the rule. I accordingly find it inappropriate to expand Parker beyond its facts--i.e., beyond a case where a demonstrably close relationship exists between the assessment levy amount and the economic benefit actually conferred upon the taxed property by the expense giving rise to the levy. Under the facts here that close relationship does not exist, since the assessment's purpose is to meet general loan repayment obligations.

The second issue raised by your question is whether the proposed levy is exempt from the property tax limitation provisions because the water and sewer district has never used its taxing authority under section 7-13-2302, MCA. Section 15-10-402(1), MCA, unambiguously proscribes any taxing jurisdiction from imposing taxes in excess of "the amount levied for taxable year 1986" with respect to most forms of property. Although that proscription has been modified somewhat by the Legislature, those changes constitute only exceptions to the general prohibition. Attorney General Greely accordingly concluded that the literal language of section 15-10-402(1), MCA, governed with respect to the analogous question of whether the tax limitation provisions applied to a taxing unit which had levied an unusually low amount in 1986 because of a budget surplus from a previous year. 42 Op. Att'y Gen. No. 21, slip op. at 9-10. While such a result may appear inequitable, it is nonetheless the only one faithful to the statute, whose provisions neither a

court nor I may ignore or rewrite. E.g., Reese v. Reese, 196 Mont. 101, 104, 637 P.2d 1183, 1185 (1981) ("the function of the Court is simply to ascertain and declare what is in terms or in substance contained [in a statute], not to insert what has been omitted or omit what has been inserted"); Chennault v. Sager, 187 Mont. 455, 461-62, 610 P.2d 173, 176 (1980) (same).

My conclusion concerning the second issue is buttressed by a 1989 amendment to section 15-10-412(2), MCA, adding the following underscored proviso:

> The limitation on the amount of taxes levied is interpreted to mean that ... the actual tax liability for an individual property is capped at the dollar amount due in each taxing unit for the 1986 tax year. In tax years thereafter, the property must be taxed in each taxing unit at the 1986 cap or the product of the taxable value and mills levied, whichever is less for each taxing unit, except in a taxing unit that levied a tax in tax years 1983 through 1985 but did not levy a tax in 1986, in which case the actual tax liability for an individual property is capped at the dollar amount due in that taxing unit for the 1985 tax year.

1989 Mont. Laws, ch. 662, § (1) (emphasis supplied). The Legislature determined through this amendment to provide limited relief only to taxing jurisdictions which imposed levies for tax years 1983 through 1985 but not for tax year 1986--a determination reflecting a legislative judgment that, in all other situations with respect to taxing units existing as of tax year 1986, the limitation imposed in section 15-10-402(1), MCA, and restated in section 15-10-412(2), MCA, applies unless specifically ameliorated by another provision. See Orlando v. Prewett, 218 Mont. 5, 10, 705 P.2d 593, 596 (1985) ("[w]e will not graft an exception on to a statute when the language does not allow for an exception"); see generally 2A N. Singer, Sutherland Statutory Construction § 47.11 (4th ed. 1984) ("[w]here there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied"). The water and sewer district may therefore impose an assessment levy for the purposes described earlier only upon compliance with the resolution and election procedure in section 15-10-412(9), MCA.

THEREFORE, IT IS MY OPINION:

> The property tax limitations in sections 15-10-401 to 412, MCA, apply to assessment levies pursuant to section 7-13-2302, MCA, by a water and sewer district for the purpose of repaying a general loan obligation even if such district has never previously exercised its levy authority under that provision.

Sincerely,

MARC RACICOT
Attorney General