



# APPENDIX E: ATTORNEY GENERAL DETERMINATIONS

VOLUME NO. 51

OPINION NO. 18

ANNEXATION - function of municipal government;  
CITIES AND TOWNS - annexation;  
LOCAL GOVERNMENT - annexation;  
MUNICIPAL GOVERNMENT - annexation;  
STATUTORY CONSTRUCTION - avoid absurd results;  
MONTANA CODE ANNOTATED - Title 7, chapter 2, parts 41, 42 to 47, 43; sections 1-2-101, 7-1-2103, 7-2-4101, (1), -4204(1), -4703(2), (3), 7-6-2501 to -2541, 13-3-101 to -105;  
MONTANA CONSTITUTION - Article XI, section 4.

HELD: Cross-county annexation is permitted by Montana law and is not dependent upon county approval.

September 21, 2006

Mr. Mathew J. Johnson  
Jefferson County Attorney  
P.O. Box H  
Boulder, MT 59632

Dear Mr. Johnson:

You have requested my opinion on an issue that has arisen in your county concerning cross-county annexation. I have rephrased your questions as follows:

Is a municipality located in one county required to obtain approval from a neighboring county if it seeks to annex territory within the borders of the neighboring county?

Montana Code Ann. § 7-2-4101 sets forth the procedure for organization of a new municipality. Subsection 1 provides:

Whenever the inhabitants of any part of a county desire to be organized into a city or town, they may apply by petition in writing, signed by not less

than two-thirds of the registered electors but not more than 300 such electors, who are residents of the state and residing within the limits of the proposed incorporation, to the board of county commissioners of the county in which the territory is situated.

Section 7-2-4204(1) governs the procedure for approval of the petition. It provides that after the petition has been filed and a census completed, if it has been determined that the requisite number of inhabitants exist for the formation of a municipal corporation, “the county commissioners shall call an election of all the registered electors residing in the territory described in the petition.”

The role established by the legislature for county government in the creation of a new municipality is a procedural rather than substantive one. The county is responsible for ensuring that the establishment of a municipality proceeds along the appropriate steps. The governing statutes do not give county government the authority to approve or deny the petition for incorporation so long as the statutory process has been observed.

Where part 41 governs organization of a municipality, parts 42 through 47 govern the annexation process for existing municipalities. The statutes provide for six independent annexation methods. Review of these statutes indicates that, as with the creation of a new municipality, the annexation provisions do not extend authority to county governments to approve or deny a proposed annexation. The permission of the county in which a municipality was originally incorporated is not required before a municipality may annex additional territory within that county. For instance, the city of Helena would not be required to request the approval of Lewis and Clark County if it proposed to annex contiguous land in Lewis and Clark County pursuant to part 43. Absent specific statutory language to the contrary, it logically follows that the neighboring county’s approval is not required if the annexation crosses over county boundaries to annex territory in a neighboring county.

Cross-county annexation of land into a city does not alter existing county boundaries or impair powers statutorily granted to county government. *See, e.g.* Mont. Code Ann. § 7-1-2103 (county powers); Mont. Code Ann. § 7-6-2501-2541 (county taxation); and Mont. Code Ann. § 13-3-101-105 (designation of precincts and polling places).

As Montana’s urban areas grow, it is likely cross-county annexation may become more common. The annexation provisions, particularly those found in part 47, express the legislature’s desire to ensure sound urban development and an acknowledgement that

municipalities are created “for the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, institutional, and governmental purposes or in areas undergoing such development, and future annexations must consider these principles.” Mont. Code Ann. § 7-2-4703(2). The legislature’s ultimate objective was to create standards for annexation in order to ensure the high quality of services needed for public health, safety and welfare. Mont. Code Ann. § 7-2-4703(3).

My role in construing a statute “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. §1-2-101. Had the legislature intended to require county approval for municipal annexation, it would have reflected its intent in statute. However, there is nothing in the plain language of the relevant statutes that indicates the legislature intended to require county approval for municipal annexation.

In addition to the governing statutes, I reviewed a memo written by then Department of Business Regulation considering the question of cross-county annexation. That memo concluded that cross-county annexation was not allowed in Montana and cited a general principle that cross-county annexation should not be allowed unless the authority for such annexation is explicitly expressed or clearly implied in statute. The memo concluded that Montana was more similar to jurisdictions that had not allowed cross-county annexation, than to jurisdictions that found it to be permissive.

After reviewing the cases on which the memo relied and I have concluded that they are inapplicable given the statutory scheme governing annexation in Montana. For instance, the express language of the governing annexation statutes in many of the cases that were cited provided that incorporated cities or towns could only annex lands which were “within the same county.” See County of San Mateo v. City Council of City of Palo Alto, 335 P.2d 1013 (Cal. App. 2d 1959); Norlund v. Thorpe, 110 Cal. Rptr. 246, 34 Cal. App. 3d 672 (1973); and McGeary v. Dade County, 342 So. 2d 549 (Fla. Dist. Ct. App. 3d Dist. 1977). As was discussed in detail above, Montana law does not expressly or impliedly limit annexation by county boundaries.

Under the Montana constitution, “the powers of incorporated cities and towns and counties shall be liberally construed.” Mont. Const. art. XI, § 4. The legislature has provided means by which municipalities may exercise the power of annexation, and I may not restrict the exercise of those powers by adding requirements the legislature has not provided. See Mont. Code Ann. § 1-2-101.

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THEREFORE, IT IS MY OPINION:

Cross-county annexation is permitted by Montana law and is not dependent upon county approval.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/anb/jym

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?

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[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