IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. _____

MONTANA ASSOCIATION OF COUNTIES ("MACO"), MICHAEL MCGINLEY, and DAVID STROHMAIER,

Petitioners

v.

STATE OF MONTANA, and the MONTANA DEPARTMENT OF REVENUE,

Respondents.

PETITION FOR ORIGINAL JURISDICTION AND DECLARATORY JUDGMENT

APPEARANCES:

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I. RELIEF REQUESTED

Petitioners Michael McGinley, David Strohmaier, and the Montana Association of Counties ("MACo") on behalf of all 56 of its member Counties (collectively "Petitioners") hereby petition this Court pursuant to Mont. R. App. P. 14(1) and 14(4) and § 15-1-406, MCA, or in the alternative § 27-8-201, et seq., MCA, for an original proceeding to grant them declaratory judgment. Petitioners request a declaration that § 15-10-420, MCA, requires the Montana Department of Revenue (the "Department") to calculate the statewide levies codified in §§ 20-9-331, -333, and -360 (the "Statewide Mills") and 20-25-439 (the "Vo-Tech Mills"), MCA according to the formula provided in subsection (1)(a), does not permit the Department to force Counties to levy more or less than the calculated mills, and does not permit the Department to carry forward mills to future years.

Montana's Attorney General rejected the Counties' request to resolve this matter through an Attorney General Opinion.[1] The existing actions and potential for additional lawsuits involving the same statutory interpretation create a significant risk of multiple differing decisions in multiple courts. There are already three separate actions pending regarding the same legal issues involving different courts and different parties. Additionally, the property tax billing cycle and

[1] *See* Exhibits 1, 2, and 5 attached to Ex. B.

limitations on taxpayer rights to property taxes require a resolution as early as possible in 2024 to permit Counties to correct their property tax bills, if required.

For purposes of establishing original jurisdiction, this case involves purely legal questions of statutory interpretation of statewide importance which impact every property taxpayer and every County in Montana. Urgency and emergency factors exist making litigation in the trial courts and the normal appeal process inadequate because the Counties mail tax bills in October, and taxes are due at the end of November and May. Resolution to permit Counties to take action in advance of that May payment deadline is crucial. The present issue will not be resolved by May if the case were to proceed in district court through final judgment, and then the inevitable appeal to this Court.

Petitioners request the Court assume original jurisdiction over this matter, order full briefing by the parties, accept briefs from amicus curiae as the Court deems appropriate, and then issue a judgment no later than March 15, declaring the proper interpretation and application of § 15-10-420, MCA, and the proper levy rate for the Statewide and Vo-Tech Mills.

II. PARTIES

Petitioner Michael McGinley is a County Commissioner in Beaverhead County and a property taxpayer. Petitioner David Strohmaier is a County Commissioner in Missoula County and a property taxpayer.

MACo is an incorporated, non-partisan association representing 56 Counties in Montana. As of the date of this filing, 41 Counties have expressly authorized MACo to pursue this action to protect their interests and advocate for their interpretation of §15-10-420, MCA. It is expected that all 56 Counties will endorse this action as soon as they are able to hold appropriately noticed public meetings and votes.

Respondents are the State of Montana and the Department. The Department is an executive branch agency of the State of Montana and is charged with calculating the maximum levy permitted for enumerated statewide mills pursuant to § 15-10-420(8), MCA.

III. BACKGROUND AND FACTS

This case arises out of the Department's historical misinterpretation and misapplication of § 15-10-420, MCA, which has resulted in all Counties consistently levying the statutory maximum rate for the Statewide and Vo-Tech Mills rather than adjusting the mill levies according to the calculation required by the plain statutory language. For the current tax year, statewide property values have increased by 39% for all classes of property and 48.5% for residential properties. Property taxes resulting from local mill levies, however, are projected to only increase approximately 4.3% due to the efforts of local jurisdictions to reduce their mill levies.

In contrast to the overall taxes and the efforts of local jurisdictions, the State and Department are attempting to increase the Statewide Mills taxes by nearly 30%. The Department's actual calculation of the Statewide Mills indicated the Statewide Mills should have decreased by 18% (from 95 to 77.89 mills) to offset some of the impact of increased values. Even with the decrease, the aggregate taxes from Statewide Mills would increase nearly 6%. However, instead of notifying Counties of its actual calculation as required, a Department policy analyst applied 17.11 "banked" mills to keep the statewide mill levy at 95 (and similarly kept Vo-Tech Mills at 1.5 mills). In doing so, the Department has impermissibly attempted to increase statewide property taxes by nearly $80 million.

There is no dispute that § 15-10-420, MCA, imposes an obligation on taxing jurisdictions to lower mill levies as necessary to comply with the statutory formula capping revenue growth at "one-half of the average rate of inflation for the prior 3 years," or that the Department is responsible for calculating the appropriate mill rate for the Statewide and Vo-Tech Mills on an annual basis. The dispute before the Court is whether the Department has authority to "bank" mills beyond the statutory maximum in certain years, and apply them in future years when the mill calculation would otherwise require the Statewide and Vo-Tech Mills to drop.

A more comprehensive recitation of the relevant facts can be found in the Complaint and the Answer and Counterclaim filed in Montana's Fourth Judicial District Court, Missoula County, on October 26, 2023, copies of which are attached as Exhibits 1 and 2. Petitioners present the following summary of the undisputed facts supporting this Petition:

1. Education in Montana is funded through a combination of local property tax levies and various State funding sources provided by legislative appropriations.

2. Over time the Legislature enacted the three Statewide Mills statutes to provide additional sources of state funding for K-12 education.[2] In 1995, the Legislature enacted the Vo-Tech Mills on five designated counties to provide an additional source of state funding for higher education.[3] Each of these four statutes authorize the "county commissioners" to impose the levies.

3. In 1999, the Legislature passed SB 184 in reaction to the voters' approval of CI-75. SB 184 was enacted to freeze property taxes and require property tax mill rates across the state to adjust or "float" in connection with changes in property values. Section 1 of SB 184 was codified as § 15-10-420,

[2] Sections 20-9-331, -333, and -360 impose statutory caps of 33 mills for county equalization of elementary funding; 22 mills for county equalization of high school funding; and 40 mills for state equalization aid.

[3] Section 20-25-439 imposes a statutory cap of 1 1/2 mills for Vo-Tech education.

MCA.

4. As originally enacted, Section 15-10-420, MCA, essentially froze property tax mill rates by limiting a mill levy to that number of mills sufficient only to generate the amount of property taxes actually assessed in the prior year. In 2001, this limitation was loosened to allow a jurisdiction to increase its levy over the property taxes actually levied in the prior year by "one-half of the average rate of inflation for the prior 3 years." This limitation has resulted in what are commonly known as "floating" mills.

5. The Department is not a "governmental entity that is authorized to impose mills." Since its original enactment, however, § 15-10-420(8), MCA, has required the Department to "*calculate*" the number of mills to be imposed for each fiscal year limited by the statutory maximum enumerated in the Statewide Mills statutes. The Department has consistently applied the formula "for calculating the number of mills" provided by the second sentence of what is now subsection (1)(a). Section 15-10-420(8), MCA, provides the Department's calculated mill rate "may *not exceed* the mill levy limits established" in the applicable levy statutes (emphasis added). As a result, at no point can the Department's calculation exceed 95 mills for the Statewide Mills or 1.5 mills for the Vo-Tech Mills.

6. In 2001, the Legislature amended the statute to include subsection 1(b), which authorizes "governmental entities" which levy less than the maximum mills

to carry forward unused mills for use in a future year. *See* § 15-10-420(1)(b), MCA. This provision allows for what is commonly called "mill banking." This is not a "calculation" but rather an authorization of discretionary decisions by local governments to levy rates different than the rate calculated pursuant to subsection (1)(a).

7. Despite not being a "governmental entity that is authorized to impose mills," the Department "has consistently interpreted subsection (1)(b) as authorizing the State to carry forward or 'bank' the mills that it could have implemented under the formula in subsection (1)(a)." *See* Ex. A, ¶ 25. Under this interpretation, "if the maximum number of mills authorized under the formula exceeds the statutory cap of 95 mills, then the Department carries forward or 'banks' the mills that it could have implemented under 15-10-420(1)(a)." *Id.*

8. The State and Department claim that the Department uses "the banked mills when needed" but acknowledge the Statewide Mills have consistently been levied at the statutory maximum of 95 mills. *See* Ex. A, ¶ 26. As a result of this admission, the Statewide Mills have always been levied at their highest possible rate; it is undisputed there have never been any excess mills to bank or to carry forward to the current year.

9. Governor Gianforte requested in writing that Counties "do everything in your authority to limit the growth of both government spending and property taxes

in your county," and to "draw down mill levies that are within your control, and keep property taxes as low as possible," but he also indicated the State did not intend to lower the rate of Statewide Mills. *See* Ex. B, ¶ 18.

10. In response to follow up requests, the Department provided numerous Counties with a copy of the excel spreadsheet it prepared for the current tax year (the "Department Spreadsheet"), which showed that the "CURRENT YEAR calculated mill levy" is 77.89. *See* Ex. 3, Declaration of Dylan Cole; Ex. B, ln. (11). The Department Spreadsheet shows the Department was claiming 26.49 "carry forward mills" and applying 17.11 of those mills to get to the maximum of 95 mills. In his declaration recently filed in the Missoula County matter, Dylan Cole, a Senior Property Tax Analyst, indicated that he was responsible for the decision to apply banked mills to reach the statutory maximum rate for the Statewide Mills. *See* Ex. C, ¶¶ 15-18.

11. Based on the Department's calculation, 49 County Commissions chose to levy 77.9 Statewide Mills.[4] Seven County Commissions chose to levy 95 mills, but 3 of those Counties (Meagher, Broadwater, and Madison) intend to hold back taxes attributable to 17.1 mills to protect their taxpayers' right to receive a refund if Petitioners or other litigants are successful in challenging the Department's historical practice.

[4] The County Commissions rounded up to the nearest tenth of a mill, as statutorily required. *See* § 15-10-420(8), MCA.

12. Imposing the 77.9 mills will still result in an overall increase in levied taxes of more than $20 million or 5.94% over 2023 taxes. Levying 95 mills instead of 77.9 mills will increase property taxes for Statewide Mills by nearly $80 million for this tax year ($437,195,109 levied tax - $358,453,969 max authorized tax = $78,741,140), which is an increase of more than 23%. *See* Ex. C.

13. Under Montana law, the second half property tax payment for the current tax year is due May 31, 2024. *See* § 15-16-102, MCA. Taxpayers who fail to pay and protest their taxes by that deadline, will lose their right to receive a refund. *See* § 15-10-420, MCA. If Petitioners are successful, but revised property tax bills are not issued in advance of that deadline, taxpayers in counties which levied 95 mills may lose their right to a refund of the illegally-levied 17.1 mills. If Petitioners are unsuccessful and Counties are required to issue revised bills after that deadline, County officials will have to administer and taxpayers will have to pay a special levy. As a result, Petitioners request a ruling by this Court no later than March 1, 2024, to permit an orderly administration of the changes which will be required to tax bills as a result of the Court's ruling in this matter.

IV. OTHER PENDING MATTERS

There are at least three currently pending matters regarding the same legal issues, but none of them will provide adequate or timely relief to Petitioners, Counties or other taxpayers in Montana. The pending action *State v. Missoula*

County, et al., described above, names only Missoula County and Missoula County officials and as noted in Missoula County's Answer in that matter, the district court lacks jurisdiction because Montana law limits the plaintiff/petitioner in a declaratory judgment regarding a tax statute to an "aggrieved taxpayer." Section 15-1-406(1), MCA.

The Montana Quality Education Coalition ("MQEC") filed a Writ of Mandamus in this Court on October 11, 2023, naming all 56 Montana Counties as Petitioners, seeking to have the Court order the Counties to follow the Department's "directive" to levy the statutory maximum for the Statewide Mills. While the Counties have not yet responded formally, if that petition is not mooted by the Court's acceptance of this Petition, it is expected the Counties will respond in that matter contesting the application of a writ of mandate as not permitted to enforce "historical administration and collection of school equalization levies." In recent days, the MQEC has begun voluntarily dismissing Counties which have levied 95 mills, so this action will not address the concerns of those Counties.

Finally, Senator Brad Molnar, an owner of residential property and Montana state Senator and taxpayer, filed a class action against the Department in the Thirteenth Judicial District Court, Yellowstone County, challenging the Department's "unlawful addition of 17.11 mills to their property tax bills." While

Senator Molnar's claims address similar issues to this Petition, it has not been served and does not involve the Counties.

V. PARTICULAR LEGAL QUESTIONS EXPECTED TO BE RAISED

1. Does the mill banking provision in § 15-10-420(1)(b), MCA, apply to the Department's calculation of Statewide and Vo-Tech Mills pursuant to § 15-10-420(8), MCA?
2. If so:
   a. Do banked mills exist relative to the Statewide and Vo-Tech Mills because the levies have never been lower than the statutory maximums?
   b. Is the authority to bank and carry forward mills for the Statewide and Vo-Tech Mills granted to the Department or the County Commissions which actually levy the taxes?

VI. SUMMARY ARGUMENT

The only way to interpret § 15-10-420, MCA consistent with the plain meaning and the clear legislative intent to provide a uniform administration of the Statewide and Vo-Tech Mills is to hold that the mill banking provisions of subsection (1)(b) do not apply to the Department's statutory calculation. Even if mill banking applies, however, the discretion to levy banked mills would rest with the County Commission, not with the Department.

The applicable rules of statutory construction to be used to construe these statutes are straightforward. When construing statutes, the court "is simply to ascertain and declare what is in terms or in substance contained therein[.]" *Boyne*

USA, Inc. v. Dep't of Revenue, 2021 MT 155, ¶ 12, 404 Mont. 347, 490 P.3d 1240; § 1-2-101, MCA. If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and the Court need go no further. *Omimex Canada, Ltd. v. Dep't of Revenue,* 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3. "By employing longstanding rules of statutory interpretation, the Court reads and construes a statute as a whole to give effect to its purpose and avoid an absurd result. Further, the Court reads a subsection from a statute at issue in conjunction with the statute's accompanying provisions." *Mont. Indep. Living Project v. State*, 2019 MT 298, ¶ 21, 398 Mont. 204, 454 P.3d 1216. Finally, if an ambiguity is found to exist regarding a taxing statute, it must be resolved in favor of the taxpayer. *Western Energy Co. v. Dep't of Revenue,* 1999 MT 289, ¶ 10, 297 Mont. 55, 990 P.2d 767. Here, all these rules of statutory construction require a declaration that for this tax year the proper calculation of Statewide Mills is 77.9 and Vo-Tech Mills is 1.3.

A. The Court must grant Declaratory Judgment in Petitioner's favor, because under the plain language of the statute, § 15-10-420(1)(b), MCA, does not apply to the Statewide and Vo-Tech Mills.

Section 15-10-420(1), MCA, only applies to "a governmental entity that is authorized to impose mills." The Department, however, is not such a governmental entity so its authority is not addressed in § 15-10-420(1), MCA. The Legislature enacted a specific provision requiring the Department, by name, to calculate on a

statewide basis the mills to be imposed under certain enumerated statutes. *See* § 15-10-420(8), MCA. If the Department were covered by subsection (1), subsection (8) would be unnecessary and redundant. Further, as subsection (1)(a) was enacted at the same time as the provision in subsection (8) and states the only formula for purposes of calculating mills in the statute, when read in context, it is beyond dispute that the Department is required to determine the mills to be levied for the Statewide and Vo-Tech Mills by applying the formula in subsection (1)(a).

Subsection (8) expressly limits the calculation of mills to the statutory caps and does not grant the Department any other authority, including the authority to exceed the statutory caps, the authority to bank unlevied mills for future years, or the authority to levy banked mills. Under basic rules of statutory construction, there is no valid argument that the Department is subject to or authorized to take any action pursuant to § 15-10-420(1)(b), MCA.

B. If § 15-10-420(1)(b), MCA, applies, the conditions under which mills could be banked have not been met.

1. The State lacks authority to bank mills and has no banked mills to carry forward.

In Montana, governmental entities can only bank mills when they impose less than the maximum authorized mills. In this case, acting in reliance on information provided by the Department, no County has ever imposed less than the statutory maximum Statewide and Vo-Tech Mills. As a result, no banked mills can exist. To

endorse the Department's interpretation, the Court would have to ignore the express limitation in subsection (8) which prohibits the Department from calculating mills higher than "the mill levy limits" in each statute. *See* § 15-10-420(8), MCA ("[T]he number of mills calculated by the department may not exceed the mill levy limits established in those sections." (emphasis added)).

The Department claims that it banks excess mills in years where its calculation exceeds the statutory maximums. *See* Ex. 3, ¶ 7. However, as the Department is statutorily prohibited from calculating mill rates in excess of the statutory limits, this practice clearly violates the express provisions of § 15-10-420(8), MCA. As a result, the mills purportedly banked in years in which the Department illegally calculated excess mills do not legally exist.

Accordingly, there can be no banked mills to carry over to supplement the difference between 77.89 mills and 95 mills in the Department's Statewide Mills calculation. Therefore, even assuming that the Statewide Mills could be banked if not imposed, there have been no years since 1993 where any excess mills could have been banked or carried forward above 95 mills, and as a result, there are no banked mills to carry forward to tax year 2024.

2. The statute grants discretion to bank mills to local governments.

The legislative history makes clear subsection (1)(b) was limited exclusively to local governments, and the Department's historic practice of "banking" mills lacks

statutory basis. When the mill banking provision of subsection (1)(b) was enacted as SB 265,[5] it was entitled:

> AN ACT ALLOWING **A LOCAL GOVERNMENTAL ENTITY** TO IMPOSE LESS THAN THE MAXIMUM NUMBER OF MILLS AUTHORIZED AND TO CARRY FORWARD THE AUTHORITY TO IMPOSE THE MAXIMUM NUMBER OF MILLS IN A SUBSEQUENT TAX YEAR . . . . (emphasis added.)

The clear intent of SB 265 was to authorize local governments to levy less than the maximum mills and to carry forward that unlevied mill authority. Nothing in the plain language or the legislative history suggests subsection (1)(b) grants the Department authority to bank or carry forward mills.

Furthermore, § 15-10-420(1)(b), MCA, is discretionary, and does not require Counties to apply banked mills in any particular year. Instead, it states:

> A governmental entity that does not impose the maximum number of mills authorized under subsection (1)(a) may carry forward the authority to impose the number of mills equal to the difference between the actual number of mills imposed and the maximum number of mills authorized to be imposed. The mill authority carried forward may be imposed in a subsequent tax year.

Section 15-10-420(1)(b), MCA (emphasis added). When construing the meaning of a statute, the Court presumes that the terms and words used were intended to be understood in their ordinary sense. In construing the plain meaning of a statute, the word "may" is commonly understood to be permissive or discretionary while, in

[5] The enactment of SB 265 ran contemporaneously with HB 124, which ultimately repealed § 7-6-2531, MCA, but never altered the stated intent of SB 265.

contrast, "shall" is understood to be compelling or mandatory. *Gaustad v. City of Columbus (In re City of Columbus Police Dep't)*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994).

By using the term "may" throughout subsection (1)(b), the Legislature has clearly evidenced a grant of discretionary authority to the local governmental entities statutorily authorized to impose mill levies, and not to the Department, which is charged with performing a calculation for enumerated levies. As a result, the carry forward of banked mills is neither automatic, nor obligatory, and to discretion to apply banked mills (to the extent doing so is legal) unequivocally resides with the Counties.

3. Even if the Legislature intended to grant the Department authority to bank Statewide Mills, doing so would be an improper delegation of legislative power.

The Court must also reject the Department's interpretation of the statute, because to adopt the Department's interpretation, the Court must conclude the Legislature intended to grant the Department discretion to set property tax rates statewide with absolutely no guidance as to how or when it should exercise such discretion. Such delegation is unconstitutional. This interpretation must be rejected.

The Legislature's ability to delegate legislative authority to an administrative agency is substantially limited. *Bacus v. Lake Cnty.*,138 Mont. 69, 78, 354 P.2d 1056 (1960). To do so, the Legislature "must ordinarily prescribe a policy,

standard, or rule for their guidance and must not vest [the agency] with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid." *Id.*

If the Legislature intended to grant DOR authority to levy the Statewide Mills and not the local governments, doing so would be an improper delegation of legislative power to the state agency. Section 15-10-420, MCA, does not prescribe a policy or standard for the Department to comply in levying the Statewide Mills. The Legislature has not offered any guidance granting Department authority to levy the Statewide Mills. Without a standard guiding the Department's exercise of discretion in setting the Statewide and Vo-Tech Mills, the Legislature would have impermissibly vested the Department with uncontrolled discretion and arbitrary rulemaking. The Court must therefore reject an interpretation which would result in an unconstitutional delegation of authority.

VII. CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition, accept jurisdiction over this matter, order such briefing by the parties and amicus as the Court deems necessary, and then issue a declaration that § 15-10-420 (1)(b), MCA, does not apply to the Department's calculation of the Statewide Mills or Vo-Tech Mills and the Department lacks statutory authority to levy banked mills or force the Counties to do so.

DATED this 26th day of October, 2023.

By: /s/ *Michael Green*
Michael Green
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11 and 14, I hereby certify that the foregoing petition is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and the word count excluding caption, tables, certificates, and signature blocks is 3995 as calculated by Microsoft Word.

DATED this 26th day of October, 2023.

By: /s/ *Mike Green*
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