

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 66

ALCOHOLIC BEVERAGES - Counting "floater" all-beverage licenses in quota of area to which transferred;

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DEPARTMENT OF REVENUE - Inclusion of "floater" all-alcoholic beverages licenses in area quota;
LICENSES - Inclusion of "floater" all-alcoholic beverages licenses in quota of area to which transferred;
REVISED CODES OF MONTANA, 1947 - Section 4-4-206(4);
MONTANA CODE ANNOTATED - Sections 16-1-103, 16-1-104, 16-4-201, 16-4-204(6)(a), 16-4-204(6)(c).

HELD: Section 16-4-204(6)(c), MCA, requires all "floater" all-alcoholic beverages licenses transferred between quota areas pursuant to section 16-4-204(6)(a), MCA, to be counted in the all-alcoholic beverages license quota five years after the date of transfer.

21 July 1982

Ellen Feaver, Director
Department of Revenue
S. W. Mitchell Building
Helena, Montana 59620

Dear Ms. Feaver:

You have requested my opinion on the following question:

Does section 16-4-204(6)(c), MCA, require all "floater" all-alcoholic beverages licenses transferred between quota areas pursuant to section 16-4-204(6)(a), MCA, to be counted in the all alcoholic beverages license quota five years after the date of transfer?

To fully answer this question, it is necessary to briefly trace the history of Montana's liquor license quota system.

The basic policy underlying liquor laws passed during the 1930's in Montana was regulation and limitation on the manufacture and sale of alcoholic beverages within the State. State v. Driscoll, 101 Mont. 348, 365, 54 P.2d 571, 578 (1936). This policy is today embodied in section 16-1-104, MCA, which provides in pertinent part:

The purpose and intent of this code are to prohibit transactions in liquor which take place wholly within the state of Montana

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except under state control as specifically provided by this code, and every section and provision of this code shall be construed accordingly.

The intent of the Legislature in enacting such restrictions was to preserve the health, welfare, and safety of the people of Montana. § 16-1-103, MCA.

In 1947, the Legislature established what has come to be known as the quota system, which limits the number of retail beer and liquor licenses which may be issued for a particular area. Today, Montana's all-beverages license quota is incorporated in section 16-4-201, MCA, which authorizes issuance of such licenses on the basis of population within a given area.

The 1947 Act contained a "grandfather clause," which has been carried over in section 16-4-201(3), MCA:

Retail all-beverages licenses of issue on March 7, 1947, and which are in excess of the foregoing limitations shall be renewable, but no new licenses may be issued in violation of such limitations.

The grandfather clause, coupled with rapid population growth between census years in some areas, has resulted in grossly unequal ratios of licenses per inhabitants in various areas throughout Montana. For example, as of the 1980 census, Virginia City has one license for every 48 inhabitants, while Billings has one license for every 1,173 inhabitants (DOR printout). One consequence of this unequal distribution of licenses in Montana is a huge disparity in the market price for a license, depending on whether an area has an excess or a paucity of licenses.

In 1975, the Legislature established "floater" all-beverage liquor licenses in an effort to facilitate more equal distribution of licenses throughout the State. Chapter 387, section 88 of the 1975 Montana Laws, amended section 4-410, R.C.M. 1947 (renumbered section 4-4-206(4), R.C.M. 1947) to allow a license to be transferred from one quota area to another in certain instances:

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(a) A license may be transferred to a new ownership and to a location outside the quota area for which it was originally issued only when the following criteria are met:

(i) the total number of all-beverages licenses in the original quota area exceeded the quota for that area by at least twenty-five percent (25%) in the most recent census; and

(ii) the total number of all-beverages licenses in the quota area to which the license would be transferred did not exceed that area's quota by more than twenty-five percent (25%) in the most recent census; and

(iii) the department finds, after a public hearing, that the public convenience and necessity would be served by such a transfer.

The obvious purpose of the 1975 "floater" amendment was to permit the transfer of licenses from areas which have an excess of licenses into areas which are experiencing a shortage of licenses. However, subsection (b) of section 4-4-206(4), R.C.M. 1947, placed certain restrictions on a license once it was floated into an area. The transferred license could not be mortgaged or pledged as security, and it could only be transferred to another person by inheritance upon the death of the licensee. The purpose of these restrictions was to prevent windfall profits. For example, without the restrictions, a person could purchase a "floater" license at a cheap price in a community which is over quota and sell it at a huge profit in an area which is experiencing a shortage of licenses.

In 1981, the Legislature further modified this statute. Section 16-4-204(6)(a), MCA, now provides that a license may be transferred out of an area which is at least 25% over quota and into an area which is not more than 33% over quota. The percentage was increased from 25% to 33% apparently to allow more licenses to be floated into areas which are growing rapidly, such as Billings and Bozeman. In addition, section 16-4-204(6)(a), MCA, now provides that the restrictions on "floater" licenses shall only apply for five years after the date of transfer. After five years, such licenses can be mortgaged, pledged as security, or transferred to another person. However, section 16-4-204(6)(d), MCA, added a new restriction to "floater" licenses. Once a

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license is transferred into a new quota area, it cannot be transferred out again.

The apparent intent of the Legislature in lifting the restrictions on "floater" licenses after five years from the date of transfer was to encourage redistribution of existing licenses. If the restrictions were maintained indefinitely, there would be very little incentive for someone to buy a "floater" and move it to another area, because the profit motive would be absent. Similarly, the apparent reason for the one remaining restriction on "floater" licenses, which mandates that they shall remain within the quota area to which they are once transferred, is to further the ultimate goal of the "floater" license amendment, redistribution of licenses throughout the State. The very purpose of transferring a license into a new quota area is to increase the number of licenses in that area. To allow the transfer of that license out of the area would defeat the purpose of the "floater" system.

In interpreting statutes, it is necessary to determine what in terms or in substance is contained therein and not to insert what has been omitted. § 1-2-101, MCA; Dunphy v. Anaconda Co., 151 Mont. 76, 80, 438 P.2d 660, 662 (1968). Nothing in the Montana Alcoholic Beverage Code can be construed to require the exclusion of "floater" all-alcoholic beverage licenses from the all-alcoholic beverages quota for a particular area. Presently, it is the policy of the Department of Revenue to exclude "floaters" when determining the quota for a particular area, probably because, prior to the 1981 amendment to the statute, "floaters" had certain negative characteristics which distinguished them from regular licenses. Since the 1981 amendments, however, those distinguishing characteristics cease to exist at the end of five years. "Floater" licenses must, therefore, be counted, just as any other all-alcoholic beverages licenses, in determining the quota for that area. To decide otherwise would be to insert a requirement which does not exist in the present statutes.

This interpretation is consistent with the general policy underlying the Montana liquor license quota system, which seeks to assure that the number of liquor licenses is commensurate with the population in a particular area. It is also compatible with the

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legislative intent embodied in the "floater" amendment, which was enacted to encourage redistribution of existing licenses in the State.

THEREFORE, IT IS MY OPINION:

Section 16-4-204(6)(c), MCA, requires all "floater" all-alcoholic beverages licenses transferred between quota areas pursuant to section 16-4-204(6)(a), MCA, to be counted in the all-alcoholic beverages license quota five years after the date of transfer.

Very truly yours,

MIKE GREELY
Attorney General