MINUTES OF THE MEETING
TAXATION COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 17, 1987

The meeting of the Taxation Committee was called to order by Chairman Ramirez on February 17, 1987, at 8 a.m. in Room 312B of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Keenan who was excused. Also present was Greg Petesch, Director of Legal Services, Legislative Council.

CONSIDERATION OF HOUSE BILL NO. 496: Rep. Dorothy Bradley, House District #79, sponsor of HB 496, told the Committee she had been working with underground utility contractors who had expressed their concern with diminishing federal funds for water systems. Rep. Bradley explained that after discussing funding options, the net proceeds tax appeared to be the best funding source, along with an increase in the public contractor's tax.

Rep. Bradley stated that construction costs would be matched by local governments as outlined on page 2 of the bill, which also sets up a public water system account. She said page 3 sets up a public water system board, and page 4, details of the grant program. Rep. Bradley advised that page 5 addressed eligibility requirements, page 6, evaluation criteria, and page 7, awarding of grants.

According to Rep. Bradley, page 8 of the bill outlines board composition, which is limited to three members, and page 9 sets composition of the board and its funding. Rep. Bradley explained that, according to the fiscal note, the 1% tax will raise approximately $4 million annually, and when matched, will provide about $12 million for infrastructure in Montana.

PROPONENTS: Ron Waterman, Montana Utility Contractors Association, stated his support of HB 496, and said grants would provide local governments with the opportunity to upgrade their water systems, and to provide jobs in Montana. He said water systems could be addressed more efficiently and effectively because the bill would allow timely completion of repairs.

Mr. Waterman stated that local bonding is becoming more and more difficult, and that the Clean Water Act, passed this year by Congress, brings more priorities into consideration. Mr. Waterman advised that HB 496 is a funding mechanism to allow necessary repairs and said the Contractors will propose an amendment to separate the 1% license fee from the

additional 1% tax. He commented that the question is whether school funding should be used for sewage and water repairs.

Jim Jensen, Montana Environmental Information Center, stated his support of the bill and said clean water systems are necessary to the environment.

Marvin Lehman, Lehman Construction Co., and Chairman, Montana Utility Contractors Association, told the Committee his industry employs more than 500 highly skilled workers in Montana, and contributes more than $100 million to the state's economy. He said the $10 million raised by the 1% tax will create $30 million for water projects, and advised the Committee of $97 million budgeted for Malmstrom Air Force Base in Great Falls for the "Midgetman" project.

Mr. Lehman stated that had HB 496 been in effect when the Canyon Ferry Bureau of Reclamation project was bid, it would have created $20,000 in additional funds. He explained his belief that road repair would benefit from the bill in both safety and health, and referred to a $5 million project at Lakeside, dealing with sewer problems and pollution of Flathead Lake, which will impact tourism.

Lloyd Lockrem, Montana Contractors' Association, told the Committee the 1% tax is commonly referred to as a gross receipts tax, but is actually a license fee. He commented he sees the problem as trying to mix a license fee with revenue. Mr. Lockrem read from the "State ex rel. Schultz-Lindsay v. Bd. of Equal.", (Exhibit #1).

Gerald Smith, Galata County Water District and Montana Rural Water Systems, read from a prepared statement in support of HB 496 (Exhibit #2).

Steve Pilcher, Water Quality Bureau, Department of Health and Environmental Sciences (HDES), read from a prepared statement in support of the bill, and said safe drinking water systems are not approved for funding under the new federal act. He suggested a priority system be developed, listing key elements, as in Section 8 of the bill, to eliminate contradiction.

OPPONENTS: John Lawton, City of Billings, told the Committee he is in agreement that local governments and infrastructure need to be addressed, and said he doesn't believe HB 496 is the appropriate vehicle .

Mr. Lawton stated he is opposed to the bill because it

amounts to hidden tax for the rate payers/taxpayers and he doesn't believe the 1% tax will come from the profits of contractors. He advised that there are no new dollars and that it is a tax upon a tax. Mr. Lawton said he believes the bill is a band-aid approach and addresses only one aspect of the infrastructure problem.

Mr. Lawton explained that the City of Billings spends $1.5-2 million annually to repair its water and sewer systems and that when the state deducts its share for administrative costs, cities will end up with fewer dollars, or subsidizing projects in other communities. He said a well-designed tax should be equitable.

Mr. Lawton advised that the City of Billings spent $28 million in sewer improvements which, if HB 496 were to pass, would cost Billings area taxpayers about $280,000. He expressed the need for a local option tax and urged the Committee to defeat the bill.

QUESTIONS ON HOUSE BILL NO. 496: Rep. Raney asked why it would cost $196,000 per year to fund the proposed board. Rep. Bradley replied she did not know, but would guess operating costs would actually be less.

Rep. Raney asked if the two-thirds match would come from local governments. Rep. Bradley replied that it would.

Rep. Raney asked if a part of existing state government could serve the purpose of the proposed board. Rep. Bradley replied she would be open to an amendment to this effect.

Rep. Raney asked Rep. Bradley if she would respond to the statement made by the City of Billings that HB 496 carries a hidden tax. Rep. Bradley replied that was not a fair statement and that local governments should look at the bill as a revolving fund for investments.

Rep. Raney asked if sewers and water were the most important piece of the expenditures pie. Rep. Bradley replied there are other ways to obtain funds for highways, and that one is not more important than the other.

Rep. Asay asked if the 1% tax would be added to a bid form, Ron Waterman replied that 1% of total dollars received is turned into revenue.

Rep. Sands asked if proposed law meant an expenditure of $4.9 million, since the fiscal note indicated a $1.3 million expenditure under current law. Rep. Bradley replied that

the bill would take effect December 31, 1987, and would affect only the last half of FY88.

Rep. Ream asked if the projects would need funding from other sources. Rep. Bradley replied that ineligible sources were identified on page 6, lines 10-11 of the bill.

Rep. Ramirez asked how much of the $288 million in FY88 and the $281 million in FY89 would be attributed to highway contracts. Rep. Ramirez advised he would have a problem with taking one-half cent out of the highway program, as the Department of Highways must then find funding elsewhere. Rep. Bradley replied that the amounts indicated by Rep. Ramirez for FY88-89, would build about one-half mile of interstate between Helena and Butte.

CLOSING: Rep. Bradley made no closing comments.

Chairman Ramirez announced a recess from 9:07 a.m. to 9:30 a.m.

DISPOSITION OF HOUSE BILL NO. 496: Rep. Williams made a motion that HB 496 DO PASS.

Rep. Hoffman asked Chairman Ramirez to elaborate on his last question to Rep. Bradley. Chairman Ramirez stated there is an issue on whether a tax can be imposed along with a fee, and said he is concerned that taking dollars from highway fund is not fair to larger communities. He added that there are better ways to fund the bill than passing a tax which will be passed right back to rate payers, and that a water bond program already exists in DNRC.

Rep. Ellison asked if HB 496 were the ultimate in a free lunch program. There was no response.

Rep. Williams stated that, in defense of his motion, all programs have inequities, and the larger cities are in a much more favorable position than the smaller towns, to finance these programs. He further stated that, in his opinion, the advantages outweighed the disadvantages.

Rep. Raney asked if more federal funds could be obtained through the bill. There was no response.

Rep. Ream said he did not agree with the idea that the bill would steal funds from highways, since the funds would come from the coal severance tax trust.

Rep. Gilbert advised that federal funds requiring state matches have created the problems the state is experiencing now, and cited SRS as an example. He said HB 496 can best be described as an underground utility relief act.

Rep. Hoffman said he had a problem with the concept of creating a new state board.

Rep. Patterson stated his opposition to creating a new board, as well, and said it only represents a shifting of funds. Rep. Patterson told the Committee any job created with tax dollars is not a job.

Rep. Gilbert made a substitute motion to Table HB 496. The motion CARRIED with eight members voting aye and seven members voting no (Roll Call Vote attached).

CONSIDERATION OF SENATE BILL NO. 122: Senator Bruce Crippen, Senate District #45, told the Committee there are 13,000 appeals of property assessments, of which an estimated 3,000 will reach the State Tax Appeals Board (STAB). He said these appeals won't be adjudicated until late in 1988 and that the bill provides the mechanics to move the appeals process along on a more timely basis.

Sen. Crippen stated that on page 2, language clarifies how notice is given to the appellant and the respondent, as well as to the County and State Tax Appeals Boards. He said page 3 sets forth criteria for hearings officers, who will record and/or transcribe hearings, but will not make decisions. Sen. Crippen explained that the Board will still make determinations.

Sen. Crippen explained that page 4, line 25, eliminates the requirements that board decisions be sent via certified mail, a savings of $18,000 in mailing fees. Sen Crippen reported that he did not sign the fiscal note, as STAB Chairman, Bob Raundal, disagreed with the anticipated fiscal impact.

PROPONENTS OF SENATE BILL NO. 122: Bob Raundal, Chairman, State Tax Appeals Board, told the Committee 2,567 appeals have been filed with the Board and that 76 of those appeals have been heard thus far in February, 1987, while another 163 appeals were being filed. He said the Board has heard a total of 690 appeals to date, and advised committee members his term on the Board will expire on March 1, 1987. Mr. Raundal stated that at least two county boards will meet well into July, 1987, on 1986 appeals.

OPPONENTS OF SENATE BILL NO. 122: There were no opponents of SB 122.

QUESTIONS ON SENATE BILL NO. 122: Rep. Raney asked for a DOR opinion on SB 122. Greg Groepper, Administrator, Property Assessment Division, DOR, stated that the department had no position on the bill, but believes it is important that appellants are given timely hearings.

Rep. Gilbert asked if the supplemental request made by STAB was considerably higher than the amount reflected in the fiscal note. Bob Raundal replied that most of that supplement is $402,000 for county tax appeal boards, and that SB 122 is for hearing officers.

Rep. Hoffman asked how many hearing officers would be hired, as allowed in section 3 of the bill. Mr. Raundal replied that three persons could be hired at one time.

Rep. Sands asked what legal recourse would be used to notify taxpayers if STAB ceased to use certified mail. Mr. Raundal replied that a return receipt would be enclosed in each envelope.

Rep. Ellison advised that the water courts send a form to be signed and returned, which is followed up by a phone call.

CLOSING: Sen Crippen asked the Committee to approve SB 122 as soon as possible to provide relief to the STAB and to provide taxpayers with timely hearings.

CONSIDERATION OF HOUSE BILL 700: Rep. Dorothy Bradley, House District #79, said HB 700 would provide authority to the Montana Science and Technology Development Board to issue science and technology development seed capital fund bonds to finance technology investments. She explained the bill would create necessary funds and account and make statutory appropriations for certain funds. (Exhibit #3)

Rep. Bradley advised that Sam Hubbard had chaired this effort and that Steve Browning worked with the alliance. She said an investment of $1.2 million is required to fund the program, which would be repaid over a period of five to seven years, during which time about 1,000 would be created. Rep. Bradley stated the investment will go to private capital companies, and that the incurred debt service is a key feature. She said the worst scenario is that the permanent trust would be out $38 million ten years from now and that, in the base instance, many supporting industries would be helped. Rep. Bradley commented that there is no single answer to changing Montana's economy, but there are many small answers.

PROPONENTS OF HOUSE BILL NO. 700: Sam Hubbard stated the bill would allow the alliance a $16 million seed fund to use for investments over a period of years. He commented that $12 million would be used and managed by the alliance board of directors and $3 million would go to capital companies. Mr. Hubbard said the board would be authorized to issue zero coupon taxable bonds in annual increments of $2-3 million, over a period of 9-12 years, then deposits those funds into investments accounts for capital investment.

Mr. Hubbard said the bill sets up a debt service reserve account until debt service on bonds is due. He explained that coal trust dollars would be required to supplement debt service dollars, if those funds were insufficient. Mr. Hubbard added that applicants would be subject to rigorous evaluation by a financial advisory panel, and review at the community level, prior to appearing before the board.

Mr. Hubbard advised that the actual investment value is 17-20%, that no collateral is required for investment, and that a percentage of sales is reserved for repayment. He stated he assumed that one-third of individual projects invested in would fail and that one-third would break even, while the remaining third would do well.

Rep. Cal Winslow, House District #89, told the Committee he sees the bill as a positive measure to compete for business in Montana in a creative way.

Richard Hammond, President, Chromato Chemical, a biotech industry, stated he originally took his plan to California capital companies with the idea of starting a business in Montana. He advised that the School of Mines at Montana Tech in Butte, made a $200,000 investment in his company. Mr. Hammond projected sales will reach $50 million by 1991, and that he anticipates a work force of 500 persons at his plant in Missoula, by that year.

Mr. Hammond said he needed capital as well as good people, but is unable to get much capital in Montana. He recommended that the state take a minimal risk to attempt to bring industry into the state.

Don Peoples, Butte-Silver Bow Local Government, and Chairman of Business Development, Montana Research and Development Institute, said it makes sense to continue this program and to promote business development for a possible 1,300 jobs by 1991. He recommended that program be expanded to allow research and development seed capital for new ventures. Mr. Peoples advised the program offers a lot to Montana, and urged the Committee to support the bill.

John Domenech, President, Scientific Services, Inc., read from a prepared statement in support of HB 700 (Exhibit #3). He stated the bill would strengthen the research base and would foster new jobs. Mr. Domenech advised that Skyland Scientific Development and Research (hi-tech), has a payroll of $750,000 and has put $1.25 million into the local economy. He explained the business provides technical services to the medical devices industry, all of which exist outside Montana. Mr. Domenech commented that he thought the technical details of the bill were good.

Tom Cable, Cable and House Ventures, Seattle, said his company invests more than $600 million in venture capital in the Seattle area. He explained it is a networking business, and that it is critical for Montana to have a focal point for venture capital companies to work with. He said twelve companies currently operating in Washington have invested nearly $22 million, and raise an additional $225 million outside the state, resulting in about 1,200 jobs. He explained that one company recently raised about $80 million outside the state of Washington, and asked the Committee to support the bill.

Terry Winters, Columbine Ventures, Denver, said his organization instituted $34 million for seed and venture capital in the rocky mountain region. He said there are not more than eight investment seed capital funds in the U.S., and that such investments are generally handled on a local basis. Mr. Winters said incomplete companies are high-risk and it is generally anticipated that about 50% will fail, while the remaining 50% usually do well.

Mr. Winters cited an example where a $200,000 investment in 1981 was purchased by a major corporation in 1985 for $27 million in cash, and now accounts for more than 1,000 jobs in the Denver area.

Bill Tietz, President, Montana State University, and members of the Science and Technology Development Board, stated that MSU has $20 million in annual research funds from outside the state, for the most part. He said the bill would attract outside venturists.

Dick Bourke, President, Development Corporation of Montana, told the Committee he has been working with venture capital for the past twenty months, but has not been involved in seed capital as it is too risky. Mr. Bourke stated his support of HB 700.

Bill Merwin, President, Northern Montana College, Havre, stated he is concerned about federal contracts. He explained the bill could provide an opportunity to those starting a venture to purchase equipment and to allow Montana business to be more competitive. Mr. Merwin added that $100 million annually would make Montana very competitive in joint ventures between colleges and private enterprise.

Stuart Doggett, Montana Chamber of Commerce, said the bill would create a better business climate.

Don Johnston, Vice President, Earth Communication Systems, Great Falls, advised that his company received funding from science and technology for laboratories. He explained his business slices old tires into strips, which are then wound on spools, to be woven into matting for erosion control. He said a new machine would cut 400 to 1,000 tires per day, adding he paid $600 for his largest piece of machinery and, $20,000 for new materials. Mr. Johnston commented he could sell his inventory now for $300,000 to $750,000.

Mr. Johnston advised the bill is vital to an inventor who can't write a business plan, has another job, etc. He explained that our economy needs new ideas and that he was projecting sales of $9 million in five years, but finds that figure will actually be much greater. Mr. Johnston said he hoped the bill would be able to provide help to inventors without cash or business know-how, and asked the Committee to support the bill.

Kay Foster, Billings Area Chamber of Commerce, stated her support of HB 700. She said the bonding program outlined in the bill will be significant to Montanans.

Rep. Bob Ream, advised that hi-tech business has been an asset to the City of Missoula.

OPPONENTS OF HOUSE BILL NO. 700: There were no opponents.

QUESTIONS ON HOUSE BILL NO. 700: Rep. Asay asked about "feasibility of matching funds" on page 10, line 21, of the bill. Mr. Hubbard replied that his committee had discussed the feasibility of funds and the committee to matches, based on an applicant finding matching funds.

Rep. Asay asked if there were a conflict between seed capital and capital for expansion. Mr. Hubbard replied definitions could be found on page 2, lines 11-25, through line 17, on page 3 of the bill.

Rep. Asay asked what the seed capital amount would be. Mr. Hubbard replied it would be $4 million for the biennium, and is not out of line.

Rep. Ream asked if there is only one capital development company in Montana. Mr. Hubbard replied there may be as many as five, but only Development Corporation of Montana is in operation. He stated that Rocky Mountain Capital in Billings is no longer functioning, and that he is aware of a small operation in the Bitterroot area.

Rep. Ramirez asked about the priority of water bonds. Mr. Hubbard replied that water bonds will have first claim in receipts.

Rep. Ramirez asked if one-fifth of the funds would go to Development Corporation of Montana. Mr. Hubbard replied that $1 million would go to each of three funds.

Rep. Ramirez, asked if this were enough money, if the program were going to do anything substantial. Mr. Hubbard explained there is danger in having too much, but enough is needed to adequately finance the projects passing due diligence.

Rep. Ramirez asked if there were conditions on development. Mr. Hubbard replied a penalty is contained in the contract, whereby any company leaving the state before its debt is repaid will owe four times the original amount of investment.

CLOSING: Rep. Bradley advised that continuing expansion of this program would create more success stories, and thanked the Committee for their anticipated support of the bill.

ADJOURNMENT: There being no further business before the Committee, the meeting was adjourned at 11:17 a.m.

Jack Ramirez

Representative Jack Ramirez,
Chairman

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2-17-87

DAILY ROLL CALL

HOUSE TAXATION COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date 2-17-87

NAME	PRESENT	ABSENT	EXCUSED
REP. RAMIREZ	✓		
REP. ASAY	✓		
REP. ELLISON	✓		
REP. GILBERT	✓		
REP. HANSON	✓		
REP. HARP	✓		
REP. HARRINGTON	✓		
REP. HOFFMAN	✓		
REP. KEENAN			✓
REP. KOEHNKE	✓		
REP. PATTERSON	✓		
REP. RANEY	✓		
REP. REAM	✓		
REP. SANDS	✓		
REP. SCHYE			
REP. WILLIAMS	✓		

CS-30

2-17-11

ROLL CALL VOTE

HOUSE TAXATION COMMITTEE

DATE 2-17 BILL NO. ~~HB~~ 496

NAME	ABSTAIN	AYE	NAY
RAMIREZ, REP. JACK		✓	
ASAY, REP. TOM		✓	
ELLISON, REP. ORVAL		✓	
GILBERT, REP. BOB		✓	
HANSON, REP. MARION		✓	
HARP, REP. JOHN	✓		
HARRINGTON, REP. DAN			✓
HOFFMAN, REP. ROBERT		✓	
KENNAN, REP. NANCY			✓
KOEHNKE, REP. FRANCIS			✓
PATTERSON, REP. JOHN		✓	
RANEY, REP. BOB			✓
REAM, REP. BOB			✓
SANDS, REP. JACK		✓	
SCHYE, REP. TED			✓
WILLIAMS, REP. MEL			✓
TALLY	1	8	7

Joann Banschbach
Secretary

Rep. Jack Ramirez
Chairman

Motion: Gilbert - Table - not passed

Form CS-31A
Rev. 1985

STATE OF MONTANA EX REL. SCHULTZ-LINDSAY CONSTRUCTION COMPANY, INC., PLAINTIFF AND RELATOR, v. THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, JOHN C. ALLEY, CHAIRMAN, MORLEY COOPER AND HOWARD LORD, AS MEMBERS THEREOF, THE STATE HIGHWAY COMMISSION OF THE STATE OF MONTANA, ALEX BLEWETT, CHAIRMAN, JOSEPH N. NASS, S. N. HALVORSON, A. M. SWANSON AND D. W. VAN DELINDER, AS MEMBERS THEREOF, DEFENDANTS AND RESPONDENTS.

No. 10913.
Submitted April 22, 1965. Decided April 26, 1965.
403 P.2d 635.

CONSTITUTIONAL LAW — LICENSES — EVIDENCE — STATUTES — DECLARATORY JUDGMENT — COURTS — WORDS AND PHRASES "court of record."

1. **Constitutional Law—Construction and determination of constitutional provisions—Presumptions and construction in favor of constitutionality.**
   Statute is presumed to be valid, and its constitutionality will not be condemned unless its invalidity is shown beyond reasonable doubt.
2. **Constitutional Law—Construction and determination of constitutional provisions—Presumptions and construction in favor of constitutionality.**
   Burden of proving invalidity of statute rests upon one attacking it.
3. **Constitutional Law—Construction and determination of constitutional provisions—Judicial authority and duty in general.**
   If it is found that statute violates Constitution, courts will pronounce it void.
4. **Licenses—For occupations and privileges—Constitutionality and validity of acts—Equality and uniformity.**
   Legislature may impose license tax on certain occupations and not on others.
5. **Licenses—For occupations and privileges—Constitutionality and validity of acts—Equality and uniformity.**
   Arbitrary and unreasonable classifications in imposing license taxes are not permissible.
6. **Licenses—For occupations and privileges—Constitutionality and validity of acts—Equality and uniformity.**
   State can, under its power to license, regulate a class, but such regulation must be reasonable and not arbitrarily discriminatory.
7. **Evidence—Judicial Notice—Matters of common knowledge—particular facts.**
   It is a matter of common knowledge that there is vast difference between profit and gross receipts.
8. **Constitutional Law—Equal Protection of Laws—Licenses and license taxes—Trade or business in general—Due Process of Law—Licenses and license taxes.**

Licenses—For occupations and privileges—Constitutionality and validity of acts—Equality and uniformity.
Statutes—General and special or local laws—Regulation of taxation—License fees.
Act providing for nonresident contractor's license fee of $25 plus sum equal to one per cent of contractor's gross receipts from business was arbitrarily and unreasonably discriminatory and violated constitutional provisions guaranteeing due process and equal protection, requiring uniformity of taxation on same class of subjects, and prohibiting special legislation.

9. **Constitutional Law—Construction and determination of constitutional provisions—Judicial authority and duty in general.**
   Judges, as members of judicial branch of government, must uphold provisions of state and federal constitutions.
10. **Declaratory Judgment—Jurisdiction of particular state courts.**
    Supreme Court is "court of record" within section of Uniform Declaratory Judgments Act providing that courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations.
11. **Courts — Courts of appellate jurisdictions — Original jurisdiction — Montana.**
    Supreme Court would accept original jurisdiction of nonresident contractor's declaratory judgment action to determine validity of statute imposing license fee on nonresident contractors, in view of emergency situation presented.

Original proceeding for declaratory judgment.

See **C. J. S.**, Licenses, § 22.

Original proceeding for declaratory judgment determining validity of statute imposing license fee on nonresident contractors.

The Supreme Court held that act providing for nonresident contractor's license fee of $25 plus sum equal to one per cent of contractor's gross receipts from business was arbitrarily and unreasonably discriminatory and violated constitutional provisisions guaranteeing due process and equal protection, requiring uniformity of taxation on same class of subjects, and prohibiting special legislation.

Judgment accordingly.

Mr. Justice Adair dissented.

Arnold A. Berger (argued), Billings, for appellant.

Edward Dussault (argued), Missoula, Jean Turnage (argued), Polson, A. W Scribner (argued), Helena, amici curiae.

Forrest H. Anderson, Atty. Gen., Helena, Donald A. Garrity, Asst. Atty. Gen., (argued), Helena, William A. Douglas (ar-

gued), Helena, Donald D. MacPherson (argued), Helena, for respondents.

MR. CHIEF JUSTICE JAMES T. HARRISON delivered the Opinion of the Court.

This is an original proceeding. On March 31, 1965, relator filed a petition requesting this court to accept original jurisdiction of a declaratory judgment action to test the validity of House Bill 506, enacted into law by the Thirty-ninth Legislative Assembly of the State of Montana, as Chapter 277 of the Laws of 1965. Hereafter, for brevity, this will be referred to as the Act.

Relator alleged in its petition that the United States of America, through its Bureau of Public Roads, participates financially in the construction of interstate, primary and secondary roads throughout this state and other states; that because of the passage and threatened enforcement of the Act the Bureau of Public Roads ordered withdrawal of Federal participating funds that other states would continue to receive such Federal participating funds and would be able to continue their highway programs but that the withdrawal of funds from Montana would cause the state to fall behind in its road construction program and the entire economy of the state would be adversely affected; that a determination of the validity of the Act was of such urgency that this court should take original jurisdiction of the controversy.

Following an ex parte hearing upon such petition, and by reason of the allegations therein contained, this court accepted jurisdiction and ordered the filing of relator's complaint, and directed the respondents to appear to answer or otherwise plead to such complaint on or before April 12, 1965. Thereafter, by order the cause was set to be heard on oral argument on April 12, 1965, and was so heard and time granted for filing additional briefs. Such briefs have been filed and the cause has been submitted.

Relator in its complaint named as defendants and respondents the State Board of Equalization and its members, and the State Highway Commission and its members, and hereafter they will be referred to as respondents.

Relator alleged, inter alia, that it was a proceeding for declaratory relief under the Uniform Declaratory Judgments Act; that relator was a North Dakota corporation constructing public highways and engaged in that business in the State of Montana; that it intended in the future to continue to engage in such business; that such business was highly competitive and contracts for the construction of highways are awarded on the basis of competitive bidding, and to compete it was essential that no unfair and artificial advantages be given to its competitors. Further that the Act discriminates against relator by requiring it to pay a different and greater tax than Montana residents engaged in the business of constructing public highways are required to pay, that the State Board of Equalization is charged with the duty of enforcing, and would enforce, the Act; that in 1964 relator had received payments for work done for the State Highway Commission and paid all Montana license taxes required; that under the Act it would be required to pay a sum greatly in excess of the amounts paid in that year and that if it received the same amount of payments for work in 1965 the license and payments required under the Act would be greatly in excess of payments required by a resident Montana corporation; that plaintiff has several contracts with the State Highway Commission and the Commission will deduct one percent of all payments due relator and deliver such money to the State Board of Equalization, to the severe and irreparable damage of the relator; and that the Act is invalid in that it violates the Constitutions of the State of Montana and the United States of America in that it denies relator the equal protection of the laws, imposes a tax which is not uniform upon the same class of subjects, and is special legislation. Relator prayed for a declaratory judgment deter-

mining the validity of the Act and the duties and obligations of relator under the Act. Annexed to the complaint as an exhibit is a copy of the Act, which reads as follows:

"AN ACT PROVIDING FOR A NONRESIDENT CONTRACTOR'S LICENSE FEE

"BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

"Section 1, As used in this act: (1) 'Contractor' means an individual, partnership or corporation performing architectural, engineering or construction work in Montana for a federal, state or local agency of government.

"(2) 'Nonresident contractor' means (a) a corporate contractor, fifty-five per cent (55%) or more of the effective ownership of which is in persons who are not residents of Montana, or (b) an individual contractor who is not a resident of Montana or who is a nonresident stockholder in a nonresident corporate contractor, or (c) a partnership contractor, fifty-five per cent (55%) or more of the effective ownership of which is in persons who are not residents of Montana or who own stock in a nonresident corporate contractor.

"(3) 'Gross receipts' shall mean all receipts from sources within the state, whether in the ferm of money, credits or other valuable consideration, received from engaging in or conducting a business, without deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, taxes, losses or any other expense whatsoever. However, 'gross receipts' shall not include cash discounts allowed and taken on sales, and sales refunds, either in cash or by credit, uncollectible accounts written off from time to time, and payments received in final liquidation of accounts included in the gross receipts of any previous return made by the person.

"Section 2. (1) For the privilege of qualifying as a nonresident contractor, a person shall first apply, upon forms prescribed by the board of equalization, and obtain a license so to do, and pay a license fee, as provided in section 3 of this act. A license issued to a nonresident contractor shall cover all its operations in Montana regardless of the number of its establishments.

"(2) Application for a renewal of a license and payment of the initial fee of twenty-five dollars ($25.00) thereon shall be made not later than January 31st of each year. However, a nonresident contractor who has purchased a contractor's license prior to the effective date of this act will have his money refunded and purchase a nonresident contractor's license.

"(3) No license shall be issued for a period of time extending beyond the termination of the calendar year for which issued.

"(4) Any nonresident contractor subject to licensing provisions of a regulatory nature such as, for example, the requirement of posting a bond before commencing business as a collection agency, must, in addition to filing the regular application above mentioned, comply with such regulatory provisions before being entitled to a license hereunder.

"Section 3. The license fee for each nonresident contractor shall be twenty-five dollars ($25.00) plus a sum equal to one per cent (1%) of the gross receipts from such business during the income year for which the license is to be issued.

"Section 4. A nonresident contractor is exempt from the contractor's license tax, the income tax provided for in Title 84, Chapter 49, R.C.M.1947, and the corporation license tax provided for in Title 84, Chapter 15, R.C.M.1947, when such nonresident contractor is covered by the provisions of this Act. All other contractors must pay the contractor's license tax; and income tax provided for in Title 84, Chapter 49, R.C.M.1947; and the corporation license tax provided for in Title 84, Chapter 15, R.C.M.1947, were applicable.

"Section 5. A state, county and city agency for whom a nonresident contractor is performing work shall withhold, in addition to any other amounts withheld, one per cent (1%) of

all payments due the contractor and send such amounts to the state board of equalization. Should the state, county and city agency, for whom the nonresident contractor is performing work or has performed work, fails to withhold such amounts, the contractor shall make payment of these amounts to the state board of equalization. These payments must be submitted to the state board of equalization by the contractor within thirty (30) days of the date on which the contractor received each increment of payment for work performed by the contractor. When the state board of equalization has collected the tax provided for in Section 3 of this act, it shall refund any surplus.

"Section 6. In case of any failure to make and file a nonresident contractor's license return, the person failing to file such a return, upon conviction shall be fined not less than one thousand dollars ($1,000.00) or more than ten thousand dollars ($10,000.00).

"Section 7. Ninety-five per cent (95%) of all license fees collected under Section 3 of this act shall be deposited in the earmarked revenue fund to be used for state equalization aid to schools; five per cent (5%) shall be deposited in the earmarked revenue fund to be used by the state board of equalization in administering this act.

"Section 8. A corporation incorporated under Montana law is exempt from the license fee provided for in Section 3 of this act either:

"(a) (i) If it has filed corporation license tax returns for at least fifteen (15) years, and

"(ii) If at least thirty-five percent (35%) of the stockholders are Montana residents; or

"(b) If fifty-five percent (55%) or more of the stockholders are Montana residents.

"Section 9. All contractors who have not been in business prior to this act shall, on request, provide the state board of equalization with any information relating to ownership. Contractors desiring exemption from the license fee in Section 3 of this act shall file proof of residency with the state board of equalization. In enforcing this act the state board of equalization shall determine effective ownership, regardless of corporate structure. A nonresident corporation may file a statement of intent to become a resident corporation with the board of equalization. The corporation's status may not be changed to resident until after five (5) years of such filing. If a corporation has been formed to circumvent the provisions of this act, it may not qualify for bidding on public projects.

"Section 10. Any bonding company furnishing bonds for a nonresident contractor shall file with the state board of equalization the names of the party or parties cosigning the bonds. A bonding company failing to file under this section shall, on conviction, be fined not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000).

"Section 11. The state board of equalization is hereby authorized to formulate rules and regulations necessary for the effective implementation of this act's provisions.

"Section 12. This act is effective on its passage and approval."

Respondents appear by answer raising two defenses. The first being that the complaint fails to state a claim against respondents upon which relief can be granted. In their second defense, respondents admit practically all of the fact allegations of the complaint, except they deny the allegations with respect to the highly competitive nature of the business of constructing public highways, and that it was essential that no unfair and artificial advantages be given to relator's competitors in that business, as well as all allegations with respect to increased payments required under the Act, of discrimination, invalidity or unconstitutionality thereof. Respondents pray that the complaint be dismissed or that the Act be adjudged valid and enforceable against relator.

The challenges levelled at the Act by the relator are:

(1) That it denies the equal protection of the law;

(2) Imposes a tax which is not uniform upon the same class of subjects; and

(3) That it is special legislation.

As to these challenges relator asserts the Act is in violation of Art. IV, § 2, of the United States Constitution, which provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Further, that it violates the due process clause contained in the Fourteenth Amendment to the United States Constitution, which in part, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."; that it violates Art III, § 27 of the Montana Constitution, which provides: "No person shall be deprived of life, liberty, or property without due process of law." and Section 11 of the same Article, which provides: "No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislative assembly."; that it violates Art. V, § 26 of the Montana Constitution which prohibits the Legislative Assembly from passing local or special laws in the instances therein enumerated, and concludes: "In all other cases where a general law can be made applicable, no special law shall be enacted."; that it violates Art. XII, § 1, of the Montana Constitution, which reads:

"The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in

this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

Finally, that the Act is unjust, inequitable, arbitrary, discriminatory and class legislation and unreasonably restricts the right of contract.

We do not deem it necessary to discuss each challenge to the constitutionality of the Act separately, but will turn to those which appear to us to be determinative in this proceeding.

[1-3] It is conceded that the Act is presumed to be valid and its constitutionality will not be condemned unless its invalidity is shown beyond a reasonable doubt, and the burden of proving its invalidity rests upon the one attacking the statute. If it is found, however, that the statute violates the Constitution the courts will pronounce it void. State v. Gateway Mortuaries, Inc., 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[4] That the Legislature may impose a license tax on certain occupations and not on others is well settled. Hale v. County Treasurer, 82 Mont. 98, 265 P. 6.

[5] However, arbitrary and unreasonable classifications are not permissible. State ex rel. Griffin v. Greene, 104 Mont. 460, 67 P.2d 995, 111 A.L.R. 770.

It is apparent that the Act is designed as a revenue measure since it allocates ninety-five percent of the fees to be collected to be used for state equalization aid to schools. Section 7 of Act. It is not, therefore, a licensing act enacted under the police power of the state.

It is contended that the Act violates the due process and equal protection clauses of the Constitution in two respects. First, it applies only to nonresident contractors, and secondly, it applies only when the contracting agency is a public body. It would appear from the wording of the Act that the residency of the contractor is the sole criterion distinguishing one group of contractors, even if we concede that such a status can be determined. There have been previous cases before this

court wherein discrimination between residents and nonresidents was charged.

In State v. Sunburst Refining Co., 73 Mont. 68, 235 P. 428, a license tax of two cents per gallon of gasoline was imposed for the privilege of doing business in Montana in the sale of such products, except those shipped into this state and sold in original containers. It was contended this license tax discriminated against Montana dealers. In its opinion this court stated:

"No one could have the temerity to say that in its practical operation the statute does not discriminate against the manufacturer of or dealer in Montana-manufactured gasoline or distillate. But it is not sufficient, to condemn the statute, that it merely discriminates against some distributors or dealers. Exact equal protection of the law is seldom, if ever, obtained; and because of the very frailty of human agencies, the authorities all recognize the right of the legislative branch of government to make reasonable classifications of subjects for property or occupation taxes (Hilger v. Moore, 56 Mont. 146, 182 P. 477), *and if the classification is reasonable, and if all of the subjects within a given class are accorded the same treatment,* the legislation cannot be said to deny to anyone within such class the equal protection of the law, even though the burden imposed upon him may be more onerous than that imposed upon a member of another class. Quong Wing v. Kirkendall, 39 Mont. 64, 101 P. 250; s. c., 223 U.S. 59, 32 S.Ct. 192, 56 L.Ed. 350 (see, also, Rose's U.S. Notes). *But to justify such discriminatory legislation, and avoid the condemnation of the Fourteenth Amendment to the federal Constitution, the classification must be reasonable—that is, must be based upon substantial distinctions which really make one class different from another.*' State ex rel. Northern Pac. Ry. Co. v. Duncan, 68 Mont. 420, 219 P. 638." (Emphasis ours.)

Later in the same opinion the court stated:

"Under our 1923 statute the place of origin is made the sole basis for the classification attempted, and if the Legislature may make the place of origin of gasoline or distillate the sole basis for classification, it may impose a license tax upon those who deal in gasoline or distillate manufactured by the Sunburst Refining Company, and exempt those who deal in gasoline or distillate manufactured by the Miles City Refinery Company. But no one would attempt to justify a classification made solely upon the basis that the first-mentioned products were manufactured at Great Falls, while the others were produced at Miles City. The statute cannot be defended upon any theory. In its practical operations it is such an arbitrary, unjust, and unreasonable discrimination against those dealing in Montana-manufactured gasoline and distillate as to deny to them the equal protection of the law."

While most of the cases which have been before this court attacking the constitutionality of license taxes have been with respect to license taxes enacted under the police power of the state, while admittedly this license tax is one enacted principally for revenue purposes, yet holdings of this court with respect to discrimination would be similar whether the license tax was one for regulations under the police power or for revenue under the taxing power.

State v. Safeway Stores, Inc., 106 Mont. 182, 76 P.2d 81, involved a challenge to the constitutionality of the eight-hour day work law, wherein it was contended that it violated the Fourteenth Amendment to the United States Constitution and section 27 of Art. III of the Montana Constitution. The court sustained the constitutionality of the law, and in its opinion stated:

"Defendant also contends that it has been deprived of the equal protection of the laws. It is argued that the statute constitutes arbitrary discrimination rather than reasonable classification. It must be remembered that in the matter of classification, the Legislature enjoys broad discretion and is not required to go as far as it might in enacting a law. The question of classification is primarily for the Legislature. The pre-

sumption is that it acted on legitimate grounds of distinction, if any such grounds existed. 6 R.C.L., § 376, p. 364; State v. Loomis, supra [75 Mont. 88, 242 P. 344]; Hilger v. Moore, 56 Mont. 146, 182 P. 477.

"The constitutional safeguard against unjust discrimination in legislation of this type is well defined by the decisions everywhere, and that is, *that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* Mills v. State Board of Equalization, 97 Mont. 13, 31, 33 P.2d 563." (Emphasis ours.)

In State v. North Am. Car. Corp., 118 Mont. 183, 192, 164 P.2d 161, 165, a case dealing solely with taxation, the statement of this court with reference to classification is apropos here, as follows:

"Sections 1 and 11 of Article XII of the Constitution of Montana respectively provide:

"'1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article.'

"'11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subject within the territorial limits of the authority levying the tax.'

"This court in interpreting these two provisions of the Constitution said, in the case of Hilger v. Moore, 56 Mont. 146, 170, 182 P. 477, 481: 'Construing the first sentence of section 1 with section 11 the meaning is reasonably clear: The taxes levied shall be uniform upon the same class of property within the same taxing district. The entire state is one district for the purpose of raising state taxes. Every county is a separate district for county taxes, every city for city taxes, etc. Or, stating the principle of sections 1 and 11 in different form, the mandatory injunction to the Legislature is that it shall prescribe such uniform mode of assessment as shall secure a just valuation of all taxable property, that all taxes shall be levied and collected by general laws and for public purposes only, and that *they shall be uniform upon the same class of property within the territorial limits of the authority levying the tax. This is the rule of uniformity declared by our Constitution, if we are able to determine the intention of its framers aright.*'

"*We think it will be admitted that any tax against the same kind of property used for identical purposes is not uniform when a different valuation and a different rate is applied to two distinct taxpayers, separately distinguishable only in name,* and the tax being imposed by the same taxing district. We further believe it will be admitted that such disregard of the uniform clause of sections 1 and 11 of Article XII, supra, constitutes clear discrimination.

"In the case of State ex rel. Northern Pacific Ry. Co. v. Duncan, 68 Mont. 420, 219 P. 638, 639, the railway company complained of discrimination by the county taxing officials where improvements on railroad land had been classified for taxation purposes in a class taking a higher rate under section 2000 [R.C.M.1921, now R.C.M.1947, § 84-302], than like improvements of other taxpayers similarly situated. The court granted the writ asked for and in the course of its opinion said:

"'It is asserted that the improvements mentioned in class 4 of section 1999 [Revised Codes 1921, now R.C.M.1947, § 84-301] apply only to those upon land, town, and city lots, and, as the improvements in question are not upon town or city lots, and not upon land because within a roadway, therefore the improvements in question do not come within class 4, and so inevitably must come within class 7. * * *

"'If respondent's contention were correct we should have different valuations for the same kind of property. If a mer-

chant owned a warehouse upon a tract of land adjoining the railroad right of way, the warehouse would be in class 4, and taxed upon the 30 per cent basis. An adjoining and precisely similar warehouse owned by the railroad upon its right of way would be within class 7, and be taxed upon the 40 per cent basis. * * * By such construction we should have two classes of improvements precisely similar, without anything to distinguish one class from another, except that the property in one class belonged to a railroad and the other to an individual.

"'"*Classification must be based upon substantial distinction which makes one class really different from another.* Northwestern Mut. Life Ins. Co. v. [State of] Wisconsin, 247 U.S. 132, 38 S.Ct. 444, 62 L.Ed. 1025." Northern Pac. Ry. Co. v. Sanders County, 66 Mont. 608, 214 P. 596.'" (Emphasis ours.)

In 1948, the court had before it the case of Brackman v. Kruse, 122 Mont. 91, 199 P.2d 971, which was an action for a declaratory judgment with respect to a licensing statute providing for a fee of $250 per quarter on wholesale dealers in oleomargarine and $100 per quarter upon retail dealers, wherein the statute was challenged as being unconstitutional because the license fees were prohibitive and confiscatory and in effect prohibited the carrying on of a legitimate business in violation of the Fourteenth Amendment to the Constitution of the United States and of sections 3 and 27 of Article III and Sections 1 and 11 of Article XII of the Montana Constitution.

Then Chief Justice Adair wrote the majority opinion of the court and discussed the difference between license fees enacted under the police power and those enacted under the taxing power as revenue measures, quoting from 53 C.J.S. Licenses § 3, these words:

"'*When Tax.* Where the fee is exacted solely or primarily for revenue purposes and payment of the fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee but a tax imposed under the power of taxation, * * *'"

The opinion continued:

"Obviously the legislature was and is without power to prohibit a legitimate business or to create a monopoly in favor of one branch of industry handling food products and against another branch of industry handling equally wholesome articles of food. (Citing cases.)"

Following a review of many authorities, the opinion stated:

"In New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 374, 76 L.Ed. 747, the court said: 'Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, "under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." * * *

"'The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.'

"In Martin v. Nocero Ice Cream Co., 269 Ky. 151, 106 S.W. 2d 64, 66, the court said: 'The evidence introduced by appellees shows conclusively that individuals and corporations engaged in the business of manufacturing and selling ice cream, heretofore, prosperous, have been operating at a loss since the tax on ice cream became effective on July 1, 1936, and that the business cannot be conducted at a profit so long as the tax is in effect.' * * * A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the

amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal. In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid.' * * *

"In Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 501, 38 L.Ed. 385, the court said: 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

"In 16 C.J.S. Constitutional Law, § 201, page 584, it is said: 'Unless the occupation or business is of a nature which is injurious or offensive to the public welfare, see 53 C.J.S. Licenses, § 19, also 37 C.J. p. 193, note 54, the imposition of a license tax contravenes the constitutional guarantees of person and property where the tax is so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation, or profession, particularly when it is levied pursuant to the police power of the state.'

"In Bessette v. People, supra, 193 Ill. 334, 62 N.E. 215, 56 L.R.A. 558, the court said: 'In Allgeyer v. State of Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." It was also said in the latter case: "The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States." * * *

"' "When the police power is exerted for the purpose of regulating a useful business or occupation, and the mode in which the business may be carried on, * * * the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment." Ruhstrat v. People, supra, 185 Ill. 133, 57 N.E. 41, 49 L.R.A. 181, 76 Am.St.Rep. 30, and authorities there referred to. It has also been held that " 'the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it.' " Id.; Black Const. Law, p. 412.'

"In 37 C.J., § 37, page 187, it is said: 'But where a license or license tax is imposed under the police power as a means of regulation, it must not be imposed upon such terms and conditions as to operate as the virtual prohibition of a useful and legitimate occupation and business; and this rule has been held to apply, regardless of whether the license tax is levied under the police or the taxing powers.' See also 53 C.J.S. Licenses, § 17.

"In Flynn v. Horst, supra, 356 Pa. 20, 51 A.2d 54, 56 in holding unconstitutional a legislative act imposing a license fee of $500 a year on wholesalers and $100 per annum on retail dealers in oleomargarine, the court said: 'For all the fiscal years between 1931 and 1946, the amount collected from oleomargarine licenses ranges from two to five times the amount expended by the Bureau of Foods and Chemistry in the enforcement of all the laws, the enforcement of which is charged to that Bureau. * * *

"'No principle is more firmly established in the law * * * than the principle that a revenue tax cannot be constitutionally imposed upon a business under the guise of a police regulation, and that if the amount of a "license fee" is grossly disproportionate to the sum required to pay the cost of the due regulation of the business the "license fee" act will be struck down. The courts interfere with the discretion of the legislature in such matters only "where the regulations adopted are arbitrary, oppressive, or unreasonable." Cooley's Constitutional Limitations, 8th ed., Vol. 2, p. 1228. The regulations in question when tested by this standard require judicial interference with the legislative act creating them.

"'We agree with the court below that the facts clearly prove that so much of section 2 of the act challenged, which imposes license fees of $500 upon wholesale dealers in oleomargarine and $100 upon retail dealers in oleomargarine, is unconstitutional and void.'"

In considering the constitutionality of the license tax imposed upon trading stamps in Garden Spot Market, Inc. v. State Board of Equalization, 141 Mont. 382, 397-399, 378 P.2d 220, 228-229, the court stated:

"The Act purports to grant to merchants in the State the right to engage in the use of stamps and devices upon the payment of the license tax, without requiring the performance of any further conditions, and that the Act, therefore, is a revenue, not a regulatory measure.

"If, as defendants contend, the Act is a regulatory measure, it is most unusual in that regard, for, other than the requirement of a license fee, the only other semblance of regulation set forth therein is that the Board may require the applicant for a license to state in his application such facts as the Board may deem necessary to enable it to pass upon the application. But, whether enacted under the guise of a regulation or whether made for the purpose of raising revenue, if the effect of a statute is to indirectly prohibit a legitimate business, so far as the police power is concerned, such a statute must be considered in the same light as a statute containing a direct prohibition. Brackman v. Kruse, supra, 122 Mont. 91, 199 P.2d 971. * * *

"While we do not bottom this opinion on whether the Act is ambiguous or misleading, or unreasonably discriminatory, or whether the penalty is excessive, yet those factors, taken collectively demonstrate that the Act clearly and palpably prohibits a legitimate business enterprise, as so declared by the Legislature.

"Under sections 3 and 27 of Article III, quoted previously, legitimate business enterprise is protected against this very type of legislation. This court in Brackman v. Kruse, supra, 122 Mont. 91, 112, 199 P.2d 971, pointed out that under either theory the Legislature cannot, directly or indirectly, prohibit a legitimate business or occupation * * *."

Recently in State ex rel. Bennett v. Stow, 144 Mont. 599, 399 P.2d 221, we reaffirmed the principle that in Montana every person has a right to operate a business subject to the applicable laws of the state, and that he may not be deprived of such a property right without due process of law as guaranteed by Section 27, Article III of our Constitution, and is entitled to the equal protection of the laws of this state as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[6] From the above authorities it appears that the state

can under its power to license, regulate a class, in this case contractors, but that such regulation must be reasonable and not arbitrarily discriminatory. The question then becomes, under the situation existing here, have the members of the class covered by the Act, nonresident contractors, been unreasonably and arbitrarily discriminated against?

Relator argues yes, decidedly so, in that nonresident contractors must pay a different license fee than resident contractors and they are both members of the same class, and that no basis exists for treating the members of the class differently for tax purposes.

Respondents contend that in the area of taxation, Montana has always treated nonresidents as a separate class, citing the differences existing as to service of process upon the Secretary of State on behalf of nonresident highway users, limiting right to vote and hold public office to its residents, and other situations of similar import, but none of these have to do with the field of taxation. It is true they cite increased fees for fishing and hunting licenses for nonresidents, that nonresidents only pay income taxes on the portion of their income earned in this state, and requirement that nonresident employers withhold income taxes upon salaries of resident employees, and contend that by reason of these situations not every statute which discriminates against nonresidents is invalid. We do not disagree with that conclusion, based on the instances cited, except that we fail to find them applicable to the situation in this case. There are distinguishing characteristics in each instance but we do not deem it necessary to further discuss them because the real argument of respondents is not based on those grounds.

What respondents actually contend is that the Legislature became aware of the need for separate tax treatment of nonresident public works contractors and devised a scheme of taxation which would recognize these differences and yet not result in any substantial discrimination to the nonresident contractor. This contention, of course, is exactly legally the opposite of the avowed purpose of the Act, it containing no police power provisions. However, for purposes of discussion we shall consider it. It was brought out on argument that nonresident corporate public works contractors received in excess of one hundred fifty million dollars from public works contracts in the fiscal year 1963-1964, and paid only $86,673.34 to the state in corporation license taxes. That comparing these figures with those of resident corporate public works contractors the Legislature had been advised that the resident contractors paid a much larger percentage of their gross receipts to the state in corporation license taxes. That by reason of this situation the Legislature determined to equalize the tax burden as between resident and nonresident contractors. Even admitting there may be differences in taxation of the resident and nonresident, respondent contends that the difficulty of collecting taxes from nonresidents is sufficient to justify their separate classification in a system of taxation.

[7] If we were to concede that the tax burden has been unequal between resident and nonresident contractors, so as to justify a different classification for each, could it be said that the imposition upon the resident contractor of a tax based upon its profit under the corporation license tax law would not be arbitrarily and unreasonably discriminatory as to a nonresident contractor upon whom a tax is computed on the basis of his gross receipts? It is a matter of common knowledge that there is a vast difference between profit and gross receipts. In the instance of profit all expenses have been paid, and it is net to the recipient; as to gross receipts nothing has been paid for expenses and there may be no profit.

[8] We cannot observe any basis under any set of facts where such a classification can be sustained as not creating an arbitrary and unreasonable discrimination; in our view the license tax here attempted to be imposed by the Act is arbitrarily and unreasonably discriminatory and in direct violation of Section 27 of Article III, Section 26 of Article V, and Section

1 of Article XII of the Montana Constitution, as well as the Fourteenth Amendment to the United States Constitution.

Article VI of the United States Constitution provides in part: "This Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[9] We, as members of the judicial branch of government, must uphold the provisions of the Constitution of the United States and the Constitution of Montana, and to do so we must and do hold that the Act is invalid and unconstitutional.

There exist many provisions in the Act which could be discussed which reflect uncertainties, conflicts and arbitrary provisions, but holding as we have and as before stated, we do not deem it necessary to further comment thereon.

All this is not to say, however, that we either condone or approve escape from legal taxation by nonresident contractors, nor do we condemn the attempt by the Legislative Assembly to remedy the inequities which rather clearly appear from the arguments presented to us in this cause. The attack upon the effort has been to the method, and it is the method that meets the constitutional objection and requires us to strike it down.

We have been favored with extensive and exhaustive briefs in this matter by counsel, as well as by amicus curiae which were permitted by the court to appear and brief this cause. We commend counsel for their briefing and oral arguments since time was short for their preparation and we extend our thanks for their fine efforts.

Mr. Justice Adair at every opportunity in this cause has contended this court has no jurisdiction in this matter because it was not originally filed in the district court. In his dissent to our order of April 26, 1965, he cites the case of Brackman v. Kruse, 122 Mont. 91, 199 P.2d 971, apparently as authority for his position. That case, like hundreds of others, was filed in the district court and appealed to this court. It is not authority for

his position because there was no application to this court to accept original jurisdiction nor any immediate emergency which would cause such a request to be made.

However, authority for accepting jurisdiction of a declaratory judgment action is to be found in the case of Carey, State Treasurer v. McFatridge, 115 Mont. 278, 142 P.2d 229, in which then Chief Justice Howard A. Johnson wrote the majority opinion for the court, and the opinion stated:

"This is a declaratory judgment action, of which this court has accepted original jurisdiction as necessary and proper to the complete exercise of its appellate jurisdiction, in view of the emergency presented and the consequent inadequacy of the ordinary appellate procedure."

Mr. Justice Adair was a member of the court at that time and filed a dissenting opinion in that case to the holding of the court, but nowhere in his dissent did he challenge the right of the court to accept original jurisdiction, and it was on the authority of that case, and other prior decisions, that original jurisdiction was accepted in this cause.

Mr. Justice Adair quotes from Section 2 of Article VIII of the Montana Constitution, but he disregards what is said in Section 3 of Article VIII that this court shall have power in its discretion to issue such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. Under this provision of the Constitution the court assumed original jurisdiction as to a writ of injunction in Sawyer Stores, Inc. v. Mitchell, 103 Mont. 148, 62 P.2d 342; of a proceeding in mandamus in State ex rel. Palagi v. Regan, 113 Mont. 343, 126 P.2d 818; of a declaratory judgment action in Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106; of an injunction in a matter pertaining to a general election in State ex rel. Greene v. Anderson, 113 Mont. 582, 129 P.2d 874.

[10] The court did not act without precedents in accepting original jurisdiction in this matter. Finally, the Uniform Declaratory Judgments Act, § 93-8901, R.C.M.1947, under which

this action was brought provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." This court is a court of record.

Additionally, this court's own rule of long unchallenged standing provides in Rule IV, subd. 1, as follows:

"*When Accepted.* This is an appellate court but it is empowered by the Constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. The institution of such original proceedings in this Court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and a due appeal to this Court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper."

[11] This is such a cause, where an emergency situation requires this court to accept original jurisdiction, and thus render a public service in the interest of justice.

MR. JUSTICES JOHN CONWAY HARRISON, DOYLE and CASTLES concur.

MR. JUSTICE ADAIR:

I dissent.

Section 2 of Article VIII of the Constitution of Montana, in part, declares that: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only."

The action now before this, the Supreme Court of Montana, is an action seeking a declaratory judgment and such action should have been commenced in a district court of this state and not in the Supreme Court. See Brackman v. Kruse, 122 Mont. 91, at pp. 93 and 94, 199 P.2d 971.

On the Supreme Court's order of March 31, 1965, I filed a written dissent wherein I stated that, "In my opinion the Supreme Court of Montana is without jurisdiction in this cause which has at no time been filed or brought in any district court of this state, and which is not brought to this court on appeal. For the above reasons I dissent to this court's attempting to exercise jurisdiction herein."

In Brackman v. Kruse, supra, the opening paragraph of the opinion reads:

"This is an action for a declaratory judgment commenced in the district court to have determined and declared the constitutionality of section 2620.45 and 2620.46, Revised Codes of Montana, 1935."

To properly confer the necessary jurisdiction upon this court in the instant cause the action should have been brought in the district court and after decision there the appeal could have been taken to the Supreme Court by any dissatisfied party to the action.

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EX 2
HB 496

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February 17,1987

Testimony on House Bill 496

My name is Gerald M. Smith. I am a member of and the operator for the Galata County Water District. I am also the co-chairman of the committee on legislation for Montana Rural Water Systems.

We support this bill because it seeks to serve the needs of the water systems of Montana as well as promoting jobs on a local level. A grant probram for the wter systems of Montana would be a real benefit in our constant struggle to meet ever increasing demands and ever more stringent regulations imposed on us on both the federal and state level. Even though the state economy is in a depressed state, we must press on with water development and especially with water treatment.

In conclusion, we urge this committee to recommend a "do pass" on this bill.

Respectfully submitted,

Gerald M. Smith

HB496

VISITORS' REGISTER

House Taxation COMMITTEE

BILL NO. HB 496 DATE Feb 17, 1987

SPONSOR Bradley

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Jim Jensen	MT. ENVIRON. INFO. CNTR	X	
John Lawton	City of Billings		✓
Jerry Driscoll	Hosp Dist #2 Billings	X	
Warren Lehmann	Lehmann Const. Co.	X	
Ronald F Waterman	Montana Utility Cost Assn	✓	
Eugene Fenderson	Mt State Bldg Trades	X	
Edward M. Smith	Salata Co-Water Dist. Mont. Rural Water Systems	X	
Dick Christoffersen	Mt. Utility Contractors	X	
Michael Richards	Waterworks Industries	X	
Bob			

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

HB700

VISITORS' REGISTER

2/17/87
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House Taxation COMMITTEE

BILL NO. HB700 DATE Feb 17, 1987

SPONSOR Bradley

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Stuart Doggett	Mt. Chamber of Commerce	✓	
John Domenech	Skyland Specialized Services	–	
Dick Bourke	Dan Cord of MT	✓	
Don Peoples	Butte Silver Bow &	✓	
~~Bob Correa~~	MERPD.		
Bob Correa	Boz. Chamber of Comm	✓	
~~Kay Foster~~	Billings " "	✓	
Thomas Cable	Cable & House Ventures	✓	
Sam Hubbard	MSTA	✓	
Jack Tankersley	Centennial Funds	✓	
Bill Stanfill	Centennial Funds	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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VISITORS' REGISTER

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House Taxation COMMITTEE

BILL NO. SB122 DATE Feb. 17, 1987

SPONSOR Crippen

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
BOB HELDING	MT. ASSOC. OF REALTORS	✓	
Bob Ruebel	State Tax Appeal Bd	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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