MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON TAXATION

Call to Order: By Senator Mike Halligan, Chairman, on February 6, 1991, at 8:00 a.m.

ROLL CALL

Members Present:
Mike Halligan, Chairman (D)
Dorothy Eck, Vice Chairman (D)
Robert Brown (R)
Steve Doherty (D)
Delwyn Gage (R)
John Harp (R)
Francis Koehnke (D)
Gene Thayer (R)
Thomas Towe (D)
Van Valkenburg (D)
Bill Yellowtail (D)

Members Excused: None

Staff Present: Jeff Martin (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: None

HEARING ON SENATE BILL 207

Presentation and Opening Statement by Sponsor:

Senator Harp, District 4, said the bill provides that the President of a unit of the university system may submit to the Board of Regents a budget in excess of the amount appropriated by the Legislature. It also allows for a vote for an additional levy up to 10 mills in support of a unit of the university system and exempts the additional levy from the property tax freeze.

In Yellowstone County one mill would raise $210,000, Gallatin County - $68,000, Missoula - $117,000, Havre - $38,000, Dillon - $15,000, Butte - $47,000. Section 2 would eliminate the extra millage for the Universities from the restraints of I105. He noted the local communities have been very supportive of the

community colleges. The Governor's universities general fund proposal for FY 1992 and 1993 is $89 million, the universities are asking for $100 million in Fy 1992 and $106 million in FY 1993. Senator Harp said the universities need every tool they can get to raise revenue. There is a great economic benefit to the communities that have units of the system in their area. The Governor's Commission on Higher Education in the '90's recommended this as an additional funding source for the university system.

Proponents' Testimony:

Dennis Burr, Montana Taxpayers Association, and a member of the Education Commission for the '90's, said it is evident that the university system needs a large increase in funding and equally evident that a large amount of money will not be raised through the legislative process. The significance of the neglected funding is not well appreciated. He noted there are people at the University who can resign their position and allow it to be advertised. In order to get any applicants, the salary is increased by $10,000, they re-apply for their own job and are still the only applicant and are rehired. He expressed a concern that if local communities do vote in an increase in mills to support their particular unit that the amount of support from the legislature will be similarly decreased.

Opponents' Testimony:

LeRoy Schram, Montana University System and representing the Commissioner of Higher Education, said the university system agonized over what stand to take on this bill. He said it is a matter of principle that these are state institutions and should be supported by the state. At the University of Montana and Montana State 75% of the students come from outside the immediate county. Those figures are approximately reversed for the community colleges. He noted a concern that once the mill levies are adopted the tendency is to institutionalize the funding. He fears the legislature will factor in those funds and the system will begin to lose ground. Another factor is that the funds will not be used where the need is the largest when you consider the student body at EMC is approximately 3900 and the potential money that could be raised is $210,000 on a one mill levy. At Bozeman, with a student body of between 10,000 and 11,000, the potential amount that could be raised is only $68,000 on a one mill levy. He noted the property tax system is overloaded and it should not be shouldering the additional funding burden. The university system needs additional funding and this is a band-aid approach. He expressed reluctant opposition to the bill.

Questions From Committee Members:

Senator Gage asked if this could have an effect on the foundation program.

Senator Harp said it could affect the foundation program.

Senator Koehnke asked who would administer the funds if the levies were passed.

Senator Harp replied the administration of funds would be done by the Board of Regents.

Senator Eck asked if the levy would be voted on every year.

Senator Harp said it isn't spelled out in the bill, but that would be his preference.

Senator Eck asked if the levy could be used for a one time expense and, if so, would that be part of the levy or would the Board of Regents still make the decision on the expenditure.

Senator Harp said the local community could not influence where the money would be spent. That decision would be under the control of the Board of Regents.

Senator Towe said he felt the purpose could be put on the ballot under the provisions of 20-9-353.

Mr. Schram said there are three basic sources of funding for community colleges. The state share is 47%, the other 53% is made up from local levies and tuition and fees.

Closing by Sponsor:

Senator Harp closed.

HEARING ON SENATE BILL 206

Presentation and Opening Statement by Sponsor:

Senator Halligan, District 29, said the bill is presented at the request of his constituents. It clarifies and strengthens procedures for obtaining a liquor license. Problems have arisen regarding repetitive applications for the same location. He said the proponents will explain the problem in greater detail.

Proponents' Testimony:

Kerry Newcomer, Attorney, Missoula, presented testimony in support of the bill (Exhibit #1).

Dan Tabish, Missoula, said he lives across the street from the bar in question. This is the fourth time he has had to close his business and come to Helena for a hearing for the denial of license for the bar. He said it has been denied all three times and he asked how many times it would be repeated.

Opponents' Testimony:

Mark Staples, Montana Tavern Association, said he didn't feel like a full opponent as he often appears as a protestant in hearings on granting of new licenses. He expressed some concern about the denial of the second application for a five year period. If an applicant can change his plans and adapt to the concerns of the neighborhood, he should be able to have a new hearing. He pointed out that striking Section 4 has the effect of having a hearing after the determination is made. He suggested the bill be amended to reflect that if a license is denied to a facility, that the use that was denied cannot be reconsidered for five years. If a new application for a new use for the license is submitted, the restrictions could then be applied to that application and both sides could use information from the previous hearing to defend or oppose the new license.

Questions From Committee Members:

Senator Towe asked for a response from Mr. Newcomer to Mr. Staples comments regarding striking Section 4.

Mr. Newcomer said he disagreed with Mr. Staples. The only time a problem arises is if there are protests to the license application.

Senator Towe asked Mr. Fehlig if an application is routinely granted unless there is a protest. If the application is routinely granted it may make more sense to have the investigation and the initial decision to be followed by the hearing if a protest is filed. This would be in opposition to the other scenario in which, if the license is not routinely granted, the hearing had better be held before the license is granted.

Mr. Fehlig said there are two references to the requirement for a hearing. The first is the reference in Section 4 which is the hearing on public convenience and necessity. Section 7 has a hearing provision which is in response to protests. The Department receives a application and begins the investigation process and review of the application. If it appears to meet the

initial qualifications, it would be published in the local newspapers and an opportunity provided to receive protests. As the statute stands, if no protest is received, there is a requirement in Section 4 that requires a hearing on public convenience and necessity. The intent of Section 4 in the bill is to delete the hearing requirement when there is no protest and the Department has determined that the minimum requirements have been met. If there is even one protest, there will be an open hearing held under the terms of Section 7.

Senator Towe asked if that means Section 4 should be stricken altogether.

Mr. Fehlig says that is, in essence, the way the Department has operated for years.

Senator Towe asked for Mr. Newcomer's response to Mr. Staples concern about the denial for one use and the application five years later for a completely different use.

Mr. Newcomer said he is concerned that if one plan is not approved, the second plan will be slightly altered in order to submit a new application. As a protestant's attorney, it is a larger problem for him. As an owner, the choice would be made on the basis of the best use of his premises as a place where alcoholic beverages would be served. The burden of choice should be on the landowner to determine the best choice for the neighborhood in which he chooses to locate. If he does that, and he is denied, then he should not be able to reapply for five years. He felt the applicant should be able to determine if his application is inappropriate during the initial investigation process with the Department and their determination that the license is justified by public convenience and necessity.

Senator Thayer asked Mr. Staples to respond to Senator Towe's questions.

Mr. Staples said it did not appear that he and Mr. Newcomer were too far apart. He felt the differences could be worked out.

Senator Van Valkenburg asked Diana Koon, Chief, DOR Licensing Bureau, how the Department feels about the issue.

Ms. Koon responded that DOR does not have a position.

Senator Van Valkenburg continued to question Ms. Koon regarding the DOR stance on the bill.

Ms. Koon said DOR has taken a neutral position. She said she has her own personal opinion on some of the issues in the bill. She felt "it would be simpler for her to process applications if she could see it all the through the process one at a time". In regard to not accepting another application for a period of five year, she said she would agree with Mr. Staples

that it should depend on the circumstances of the denial or the withdrawal. In her opinion, she would amend the language on withdrawals. She would be more comfortable if there were a Department decision on an application rather than a withdrawal. There could be circumstances where an application is denied and another party comes in two or three years later with a completely different concept that would be acceptable to the people in the area. Under the five year plan, there would be no opportunity to inform the people until the time had lapsed.

Senator Van Valkenburg would like a Department decision as to the best public policy in this whole area.

Senator Eck asked if it is policy to have all the hearings in Helena.

Ms. Koon replied the law states all hearings must be held in Helena.

Senator Towe agreed with Senator Van Valkenburg and said Mr. Adams should take a position and relay that decision to the committee.

Senator Yellowtail said the primary concern of Section 2 is the welfare of the people in the district. He asked if "public convenience and necessity " is defined anywhere in the statutes.

Mr. Newcomer said it is not defined that he is aware of and he had doubts that it could be adequately defined except in terms of the location and effects on the neighborhood.

Senator Doherty asked how many people are employed in the licensing division.

Ms. Koon replied there are 20 employees. The Division contracts with the Attorney General's office for hearing officers.

Senator Gage suggested if the welfare of the people in the vicinity is going to be affected the bill should reflect "any license in that vicinity" for five years.

Mr. Newcomer responded there could very well be a due process problem inherent in that solution.

Senator Gage referred to the eligibility requirements and asked if the state has any obligation or liability to the licensees or does the legislature

Mr. Fehlig responded rules cannot be changed that are not in compliance with the law or create a rule that is not implied in the statutes. If the eligibility requirements are changed, there has to be some consideration given to a grandfather clause and to methods of dealing with transfers.

Closing by Sponsor:

Senator Halligan closed by saying clearly Section 1 dealing with repetitive applications needs to be addressed. He felt DOR agrees with this. Although the bill was born of the Missoula situation, he felt it was a public interest that should apply statewide. He said he would work with Mr. Staples on the use issue. He asked DOR to address the "clean-up" issues, as well, in an effort to deal with the whole area of licensing. He indicated that he would work with Mr. Staples and Mr. Newcomer in order to develop a workable compromise.

HEARING ON SENATE BILL 213

Presentation and Opening Statement by Sponsor:

Senator Towe, District 46, said the bill arose from a special situation with a client who owned a parcel of property outside of Billings that was sold at a tax sale because he had not received notice of taxes due. The man had been absent from his residence for approximately four months laboring under the assumption that his taxes were paid in full. The law says a certified letter must be sent to the property owner before the property can be sold at tax sale. The notice was sent, but, because the gentleman was away, he did not receive the notice to pick up the letter and it was then sent back to the county. The county has no further obligation for notification under existing law, therefore, the property was sold.

The bill would revise the notification procedure, requiring that in cases in which notice sent by certified mail is returned unclaimed, notice shall be served pursuant to Rule 4 of the Montana Rules of Civil Procedure and notice will posted on the premises.

Proponents' Testimony:

There were no proponents.

Opponents' Testimony:

Gordon Morris, Executive Director, Montana Association of Counties, said he opposed the bill for a variety of reasons. He said MACo has extensively studied the tax deed provisions of the law and recognizes there are some problems. He said if a tax payment is not made in November for the first half taxes, a delinquency is created. The Treasurer then publishes notice of the delinquency. At that point anyone can take an assignment on the property which will stay in effect until the taxes are paid. If the taxes are allowed to go delinquent for a total of 36

months, then the county is authorized to proceed with the transfer of the tax deed. The redemption period is 36 months for residential property and 24 months for subdivided property. There is a notice published in the paper every November and May during the 36 month period.

He said the title says the property tax sale notice is being revised. The notice of issuance of tax deed is, in fact, being revised in Chapter 18 rather than Chapter 17, therefore, the bill is flawed. The entire provision is applicable only if the person taking tax deed is someone other than the county. He presented copies of Rule 4 to the committee (Exhibit #2). He said Rule 4 is a lawyer's nightmare.

Mike Stephen, Montana Clerk and Recorders, expressed opposition to the bill.

Sharon Lincoln, Rosebud County Treasurer, expressed opposition to the bill as presented and agreed with the previous testimony.

Questions From Committee Members:

There were none.

Closing by Sponsor:

Senator Towe closed by rebutting Mr. Morris' arguments. He said part of the problem is the Post Office. He indicated he was not referring to the original sale, but the tax deed. Due to a Supreme Court ruling, all tax deeds during the depression were ruled invalid. He said you cannot rely on a tax title taken in Montana.

ADJOURNMENT

Adjournment At: 10:00 a.m.

SENATOR MIKE HALLIGAN, Chairman

JILL D. ROHYANS, Secretary

MH/jdr

TA020691.SM1

ROLL CALL

SENATE TAXATION COMMITTEE

DATE 2/6/91

52nd LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
SEN. HALLIGAN	X		
SEN. ECK	X		
SEN. BROWN	X		
SEN. DOHERTY	X		
SEN. GAGE	X		
SEN. HARP	X		
SEN. KOEHNKE	X		
SEN. THAYER	X		
SEN. TOWE	X		
SEN. VAN VALKENBURG	X		
SEN. YELLOWTAIL	X		

Each day attach to minutes.

DATE 2/6/91

COMMITTEE ON Taxation

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Eric Fehlig	DOR	206		
KERRY NEWCOMBE	SELF - LICENSE PROTESTOR	206	✓	
Diana Koon	DOR	206		
Gordon Morris	MACo	207 213		
[illegible]	MT. Univ System	207		✓
Marie E Durkee	MTA	206		
Mark [illegible]	MT TAVERN ASSN	206		✓
DAN TABISH	SELF	206	✓	
Dennis Burr	MT Taxpayers Assoc	207	✓	
Sharon [illegible]	[illegible] Co Treas	SB213 ~~[illegible]~~		✓
Mike Stephen	MT Clerk & Recorders Assn	SB 213		

(Please leave prepared statement with Secretary)

Senate Bill 206
Introduced by Sen. Halligan

Proponent's Summary for
Kerry N. Newcomer
265 West Front
Missoula, MT 59802
728-4950

Problems addressed by SB 206:

1. Existing application procedures for alcoholic beverage licenses do not prohibit consideration of concurrent non competing applications for the same location. After a decision denying a contested application the Department of Revenue has gone on to consider a second application for the same premises while the first decision is under administrative appeal or judicial review. This can happen where the applicant abandons or withdraws the initial application and submits a second application. The Department of Revenue does not have clear authority to rely upon prior decisions, so the Department considers the second application without a determination on the merits of the initial application. Interested persons have a right to participate in these decisions and the inability to reach a determination on the merits deprives those interested in substantive due process.

   - Section 1 of SB 206 requires completion of administrative and judicial review before a subsequent application may be considered.

2. After an application is denied based upon suitability of location, subsequent applications for the same location must be considered by the Department of Revenue. Under existing procedures the Department publishes notice of the application and holds a hearing if protests are received. Opponents of the application may be required to duplicate their efforts opposing applications for the same location. Department efforts and time are also duplicated.

   - Section 2 of SB 206 prohibits consideration for five years of an application for a location that has been found to have an adverse and serious affect on people residing in the vicinity.

3. Under existing procedures the Department of revenue must publish a notice of an application and hold a public hearing if any protests to the application are received. It is not clear if the Department has discretion to deny an application before publication.

- Section 4, amending § 16-4-203, MCA, puts the initial burden on the Department to determine that issuance or transfer of the license is justified by public convenience and necessity. If there is a basis for denial, such as a determination that the location adversely affects the residents in the vicinity, the Department has discretion to deny the application without conducting a public hearing. The applicant retains the right to administrative review. If the Department does not deny the application, then notice is published and if the application is opposed, a public hearing is held.

- Section 5, amending § 16-4-207, MCA, modifies the investigation provisions of the code to be consistent with the Department's discretion to deny an application before publication and hearing.

4. Once an application is granted the Department has no apparent authority to place restrictions on a license.

- Section 3, amending § 16-1-302, MCA, gives the Department authority to restrict a license after a hearing or by agreement.

- Section 6, amending § 16-4-402, MCA, provides the Department an enforcement mechanism where false information is given on application or renewal.

- Section 7, amending § 16-4-404, MCA, clarifies when notice of transfer must be published for existing licenses.

- Section 8, amending § 16-4-405, MCA, clarifies when the Department is prohibited from issuing a license.

- Section 9, amending § 16-4-406, MCA, provides the Department a method and authority for review of licensing eligibility.

Rule 2. One form of action. There shall be one form of action to be known as "Civil Action."

History: En. Sec. 2, Ch. 13, L. 1961.

Cross-References
One form of civil action, 25-1-101.

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of action. A civil action is commenced by filing a complaint with the court.

History: En. Sec. 3, Ch. 13, L. 1961.

Cross-References
When action considered pending, 25-1-103.
When action commenced, 27-2-102.

Rule 4. Persons subject to jurisdiction — process — service

Cross-References
Service of process and other papers, Title 25, ch. 3.

Rule 4A. Definition of person. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Cross-References
Definition of person, 1-1-201.

Rule 4B. Jurisdiction of persons. (1) Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within, this state, or as personal representative of any estate within this state.

(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984.

Cross-References
Subject matter jurisdiction of District Courts, 3-5-302.
Lack of jurisdiction as defense, Rule 12(b), M.R.Civ.P.

Rule 4C. Process. (1) Summons — issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) Summons — form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing the following: "This action is brought for the purpose of quieting title to land situated in ... County, Montana, and described as follows: (Here insert descriptions of land.)." For exceptions to this form of summons see 4D(4) "Other service," set forth hereinafter.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Cross-References
"Process" defined, 25-3-101.
Designating unknown persons as defendants, 25-5-504.
Summoning joint debtors not originally served, 25-15-101.
Summons in Municipal Courts, 25-30-103.
Summons in partition proceedings, 70-29-110.

Rule 4D. Service. (1) By whom served. (a) Service of all process shall be made in the county where the party to be served is found by a sheriff, deputy sheriff, constable, or any other person over the age of 18 not a party to the action.

(b) (i) A summons and complaint may also be served upon a defendant who is an individual other than a minor or an incompetent person or upon any domestic or foreign corporation or partnership or other unincorporated association by mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing the summons and complaint, service

of such summons and complaint shall be made by one of the persons mentioned in Rule 4D(1)(a) in the manner prescribed by Rule 4D(2) and Rule 4D(3).

(ii) Unless good cause is shown for not doing so, the court shall order the payment of costs of the personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(iii) The notice and acknowledgment of receipt of summons and complaint shall be signed and dated. Service of summons and complaint will be deemed complete on the date of signature of the defendant as shown on the acknowledgment.

(2) Personal service within the state. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for

corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the secretary of state, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for

each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as herein above provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within 60 days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency, board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the attorney general and to any other party which may be prescribed by statute.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal service outside the state. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of

this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of 33-1-603, 33-1-613, 33-1-614, 33-2-314, 33-2-315, 70-28-207, 70-28-208, 70-28-209, and 70-28-212, Montana Code Annotated, when the action pertains to the provisions of such sections.

(5) Service by publication — when permitted — effect — manner — proof.

(a) When permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for dissolution or for a declaration of invalidity of a marriage of a resident of this state or for modification of a decree of dissolution granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of service by publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of pleading and affidavit for service by publication; and order for publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of plaintiff and against the defendant in one of the situations defined in (a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), a return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that diligent search and inquiry for all persons who claim, or might claim, right, title, estate, or interest in, or lien or encumbrance

property, or any thereof, adverse to plaintiff's ownership, or any cloud upo plaintiff's title thereto, whether such claim or possible claim be present contingent, including any right of dower, inchoate or accrued, and that he ha specifically named as defendants in such action all such persons whose name can be ascertained; such affidavit shall be sufficient evidence of the diligenc of any inquiry made by the affiant, if the affidavit recite the fact that diligen inquiry was made, and it need not detail the facts constituting such inquir and if desired, it may be combined in one instrument with the affidav required under 4D(2)(f), or 4D(6); and (iii) in the situation defined i (5)(a)(iv) above, there must be first presented to the court proof that a wri attachment or garnishment has been effected. Upon complying herewith, th plaintiff may obtain an order for the service of summons to be made upo the defendants by publication, which order may be issued by either the jud or the clerk of the court.

(d) Number of publications. Service of the summons by publication ma be made by publishing the same three times, once each week for 3 successiv weeks, in a newspaper published in the county in which the action is pendin if a newspaper is published in such county, and if no newspaper is publish in such county then in a newspaper published in an adjoining county a having a general circulation therein.

(e) Mailing summons and complaint. A copy of the summons for pub cation and complaint, at any time after the filing of the affidavit for pub cation and not later than 10 days after the first publication of the summo shall be deposited in some post office in this state, postage prepaid, directed to the defendant at his place of residence unless the affidavit publication states that the residence of the defendant is unknown. If defendant is a corporation, and personal service cannot with due diligence effected within Montana on any of the persons designated in D(2)(e) ab then service may be completed on said corporation by service upon the se tary of state in the manner, and following the procedure outlined in D(2 above.

(f) Time when first publication or service outside state must made. The first publication of summons, or personal service of the summ and complaint upon the defendant out of the state, must be made within days after the filing of the affidavit for publication. If not so made, the ac shall be deemed dismissed as to any party intended to be served by publication.

(g) When service by publication or outside state complete. Servic publication is complete on the date of the last publication of the sum or in case of personal service of the summons and complaint upon the dant out of the state, on the date of such service.

(h) Additional information to be published. In addition to the fo summons prescribed above in "C. Process, (2) Summons—form," the lished summons shall state in general terms the nature of the action, all cases where publication of summons is made in an action in whic title to, or any interest in or lien upon real property is involved, or af or brought into question, the publication shall also contain a descript the real property involved, affected or brought into question thereby statement of the object of the action.

(6) (a) Service on secretary of state. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may serve copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of affidavit reciting: (1) the fact of service upon him by the clerk of court, stating the day, and hour of such service; (2) the fact of his mailing a copy of summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so by the provisions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant, where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said

clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) Continuance to allow defense. In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit the deposit of a copy of the summons and complaint in the post office required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place service.

(e) If service is made under Rule 4D(1)(b) above, return shall be made the sender's filing with the court the acknowledgment received pursuant such subdivision. Failure to make proof of service does not affect the valid of the service.

The certificate or affidavit of service mentioned in this subdivision m state the time, date, place, and manner of service.

(9) Contents of affidavit of service. Whenever a process, pleading, or of court, or other paper is served personally by a person other than the sher or person designated by law, the affidavit of service when made, shall st that the person so serving is of legal age, and the date and place of ma the service. It also shall state that the person making such service knew person served to be the person named in the papers served and the per intended to be served.

(10) Procedure where only part of defendants are served. If the summ is served on one or more, but not all, of the defendants, the plaintiff may ceed to trial and judgment against the defendant or defendants on whom process is served, and may at any time thereafter have a summons again defendant not served with the first process to cause him to appear in court to show cause why he should not be made a party to such judg Upon such defendant being duly served with such process, the court hear and determine the matter in the same manner as if such defendant been originally brought into court, and such defendant shall also be al the benefit of any payment or satisfaction which may have been made judgment before recovered.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 196 Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept.

eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976; amd. Sup. Ct. Ord. Oct. 9, 1984, eff. Oct. 9, 1984.

Cross-References

Service in national parks, 2-1-205, 2-1-207.
Service on Indian land, 2-1-307.
Service of process on state, 2-9-313.
Process of District Courts, 3-5-304.
Registration of process servers, Title 25, ch. 1, part 11.
Service of process and other papers, Title 25, ch. 3.
Secretary of State's fees for accepting service of process, 25-10-206.
No charge for copies furnished by party, 25-10-402.
Permissible use for affidavits, 26-1-1002.
Affidavit of printer or publisher as evidence of publication, 26-1-1011.
Corporate stock — service on Secretary of State, 27-18-410.
Duty of Secretary of State — fees, 27-18-411.
Service of Writ of Certiorari, 27-25-204.
Service of Writ of Mandamus, 27-26-205.
Service of summons in quo warranto action, 27-28-202, 27-28-203.
Commissioner of insurance as attorney for service of process, 33-1-601.
Service of process on foreign, alien, and domestic insurance corporations, 33-1-602.
Serving process on insurance companies, 33-1-603.
Service of process upon corporation, 35-1-307.
Service of process on foreign corporation, 35-1-1014.
Service of process upon nonprofit corporation, 35-2-304.
Service of summons in action for forcible entry and unlawful detainer, 70-27-114.
Action for partition of real property, manner of service, 70-29-111.

Rule 5. Service and filing of pleadings and other papers

Rule 5(a). Service — when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

History: En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Cross-References

Service of papers after defendant's appearance, Title 25, ch. 3, part 4.
Service of notice of intent to institute forfeiture proceedings, 44-12-201.

Rule 5(b). Service — how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney service shall be made upon the attorney unless service upon the party itself is ordered by the court. Service upon the attorney or upon a party may be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

History: En. Sec. 5, Ch. 13, L. 1961.