

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By CHAIRMAN DICK KNOX, on March 12, 1993, at 3:00 p.m.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Rolph Tunby, Vice Chairman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Russ Fagg (R)
Rep. Gary Feland (R)
Rep. Mike Foster (R)
Rep. Bob Gilbert (R)
Rep. Hal Harper (D)
Rep. Scott Orr (R)
Rep. Bob Raney (D)
Rep. Dore Schwinden (D)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Howard Toole (D)
Rep. Doug Wagner (R)

Members Excused: None

Members Absent: None

Staff Present: Todd Everts, Environmental Quality Council
Michael Kakuk, Environmental Quality Council
Roberta Opel, Committee Secretary

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

Committee Business Summary:

Hearing: SB 261, SB 104 and SB 171
Executive Action: SB 104, SB 231, SJR 24

HEARING ON SB 261

Opening Statement by Sponsor:

SEN. STEVE DOHERTY, SD 20, Great Falls, presented SB 261 which revises Montana Subdivision law. The bill defines minor subdivisions which are five or fewer acre parcels and differs, therefore, from REP. FAGG'S bill, HB 408. SB 261 removes both the 20 acre exemption and the occasional sale.

Proponents' Testimony:

Christine Mangiantini, on behalf of the League of Women Voters, told the committee that existing subdivision statutes need reform by eliminating the family conveyance.

Fern Hart, Missoula County Commissioner, stated that only 12% of Missoula County land was reviewed for subdivision between 1972 and 1973. Subdivision reform is imperative, she added.

Brooks Martin, on behalf of the Sierra Club, stated the family exemption should be included in SB 261.

Blake Wordal, Lewis and Clark County Commissioner, stated that in the last six weeks, 230 certificates of survey for 20 acres or more have been filed.

Jim Richard, Montana Wildlife Federation, testified in support of the bill.

George Schunk, Department of Justice, said controversy about subdivision continues between landowners and clerks of court.

Brian McNitt, Montana Environmental Information Center, (MEIC), said SB 261 addresses the worst of the state's subdivision problems.

Katherine Macefield, Helena Planning Director, submitted proponent testimony. EXHIBIT 1

Janet Ellis, Montana Audubon Legislative Fund, said they favored the language within SB 261.

Stan Bradshaw, Montana Trout Unlimited, echoed previous testimony supporting the bill.

Opponents' Testimony:

Tom Hopgood, Montana Association of Realtors, stated SB 261 does not meet criteria for proper land review.

Dan McGee, Montana Association of Registered Land Surveyors, stated surveyors are the only professionals who implement the requirements of the Montana Platting Act. SB 261 will eliminate basic property rights by transferring these rights to local government, he said. EXHIBIT 2

Steve Mandeville, Montana Association of Realtors, said he supports testimony of the Montana Association of Realtors.

Ted Doney, on behalf of the Montana Dairymen's Association, said the Association is very active in subdivision reform. MDA does support HB 408 and HB 280.

Candance Torgerson, on behalf of the Montana Stockgrower's Association, said that unless significant amendments are adopted, the Association will not support SB 261.

John Willard, Billings, said private property rights should be protected by law. The subdivision review process needs to be simple and concise.

Lorna Frank, Montana Farm Bureau, said they have concern for property rights. The Bureau supports SB 280 over SB 261.

Doug Olson, lobbyist, Paradise Valley Coalition, said SB 261 changes the definition of what constitutes a subdivision.
EXHIBIT 3

Questions From Committee Members and Responses: None

Closing by Sponsor:

REP. DOHERTY said he would like to urge the committee to read the Leach decision. EXHIBIT 4 The push is on for subdivision reform and the time is now.

HEARING ON SB 104

Opening Statement by Sponsor:

SEN. DELWYN GAGE, SD 5 Cut Bank, said SB 104 was presented at the request of Billings area residents. As a sound conservation bill, it will further the oil and gas conservation effort.

Proponents' Testimony:

Kemp Wilson, on behalf of Norfolk Energy, Billings, said the many changes proposed within SB 104 give the Montana Oil and Gas Board needed flexibility and leeway. Montana needs this legislation.

Janelle Fallan, Montana Petroleum Association, noted that well spacing is no longer done in Montana, as it wastes resources.
EXHIBIT 6

D. Rickman, Montana Board of Oil and Gas, said they support SB 104.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. HARPER asked Ms. Rickman if the industry will support SB 104. Ms. Rickman replied that the oil and gas industry does support the bill.

Closing by Sponsor:

SEN. GAGE said that SB 104 is a good conservation bill that may stimulate economic activity in Montana.

HEARING ON SB 171

Opening Statement by Sponsor:

SEN. MIKE HALLIGAN, SD 34, Missoula, said HB 171 is designed to clarify confidential mining permit applications. SB 171 weighs and balances the public's right to know through a district court decision.

Proponents' Testimony:

Jim Jensen, MEIC, submitted the court's decision Cause No. CDV-92-010 MEIC, vs. Montana Department of State Lands (DSL) and the Montana Mining Association. EXHIBIT 6

Dennis Olson, Northern Plains Resource Council, testified in support of SB 171.

Opponents' Testimony:

John Fitzpatrick, on behalf of Pegasus Gold, said the bill, as written, leaves statutes regarding geology too open.

Questions From Committee Members and Responses:

REP. FELAND asked Mr. Fitzpatrick what type of information is not included in SB 171. Mr. Fitzpatrick replied a record of the assay of materials is omitted.

REP. RANEY asked SEN. HALLIGAN if the bill opens to review proposed geological information. SEN. HALLIGAN stated that as the bill is currently written, the public has access to all information. He urged the committee to table the bill rather than allow the court case to stand.

REP. RANEY asked if the rock is acid bearing, shouldn't the public have the right to know. SEN. HALLIGAN said balancing will be used to weigh information released to the public.

REP. RANEY said the bill allows the mining industry to protect itself by asking for an injunction if it appears the mining industry is planning to release improper information.

REP. RANEY asked Mr. Jensen to review the proposed amendments. EXHIBIT 7 Mr. Jensen replied that if the bill is amended as proposed, an additional \$10,000 will be used in court fees. These amendments do not protect the mining industry, he continued, as their issues are already protected.

REP. SCHWINDEN asked SEN. HALLIGAN if the bill is tabled, will it be presented next session. SEN. HALLIGAN said he did not expect the bill to be back. He stated it is possible to send a request stating that policy should be decided by the supreme court.

REP. HARPER asked Mr. Jensen if he agreed that the bill should not have gone to the legislative council. Legislators should not take district court decisions and make them statute.

Closing by Sponsor:

SEN. HALLIGAN closed on SB 171.

EXECUTIVE ACTION ON SJR 24

REP. BIRD told the committee she will propose changes to SB 296 which will be presented on the floor. The Water Well Driller's Association is comfortable with these changes, including training for prospective water well drillers.

Motion: REP. RANEY MOVED THAT SJR 24 BE CONCURRED IN.

Discussion: REP. GILBERT said the bill maintains that the current Streamside Management Zone (SMZ) isn't wide enough. The mandatory SMZ will work as it should, he said.

REP. RANEY reminded the committee that if the legislature does not look ahead at issues such as SMZ, the end result is to force legislation on citizens. Best management practices is a good example of forced legislation.

REP. FOSTER said he does not understand why this legislation is necessary and will oppose SJR 24.

REP. WAGNER said SJR 24 is absolutely unnecessary.

REP. STOVALL asked if the resolution covers all stream sites. He said the bill is unnecessary.

REP. FAGG said he will support SJR 24 because whatever work the DSL conducts will be voluntary.

REP. SCHWINDEN said he has found that negotiation, rather than litigation, produces the best result for the state and its citizenry.

REP. GILBERT commented that often voluntary becomes mandatory.

REP. TOOLE said REP. GILBERT is arguing against himself.

REP. GILBERT moved his amendments to SJR 24. EXHIBIT 7 The amendments will strike DSL and insert forestry service.

REP. RANEY said he believes the amendment strikes a good compromise.

REP. HARPER said the amendments will increase timber harvesting.

REP. ORR said he supports the amendments.

REP. BROOKE said she would like to see the word education inserted in the bill.

REP. GILBERT said he prefers the amendments remain as proposed.

Motion/Vote: TO ADOPT REP. GILBERT'S AMENDMENTS. Motion carried unanimously.

Motion/Vote: MOTION THAT SJR 24 BE CONCURRED IN AS AMENDED. Motion carried 12 to 4 with REPS. BIRD, FOSTER, WAGNER and FELAND opposing the bill.

EXECUTIVE ACTION ON SB 231

Motion: REP. FAGG MOVED THAT SB 231 BE CONCURRED IN.

Discussion: REP. GILBERT asked to have SB 231 explained to him as he missed parts of the initial hearing.

Michael Kakuk, legal counsel, explained that language in the bill has been changed to substantial, credible evidence. The new language in SB 231 attempts to clear up language discrepancy.

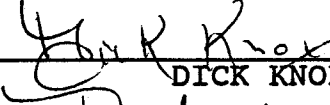
Motion/Vote: SB 231 BE CONCURRED IN. Motion carried 15 to 1 with REP. GILBERT abstaining.

EXECUTIVE ACTION ON SB 104

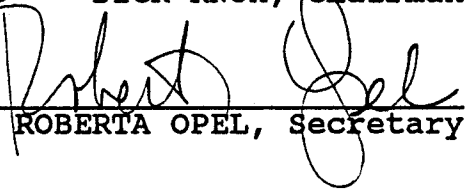
Motion/Vote: REP. RANEY MOVED SB 104 BE CONCURRED IN. Motion carried unanimously.

ADJOURNMENT

Adjournment: 7:05 p.m.



DICK KNOX, Chairman



ROBERTA OPEL, Secretary

DK/ro

HOUSE OF REPRESENTATIVES

Natural Resources COMMITTEE

BILL NO.

ROLL CALL

DATE 2-12-93

NAME	AYE	NO	
Jody Bird	✓		
Vivian Brooke	✓		
Rugg Fagg	✓		
Gary Feland	✓		
Mike Foster	✓		
Bob Gilbert	✓		
Hal Harper	✓		
Scott Orr	✓		
Bob Raney	✓		
Dore Schwinden	✓		
Jay Stovall	✓		
Emily Swanson	✓		
Howard Toole	✓		
Doug Wagner	✓		
Rolph Tunby, Vice Chairman	✓		
Dick Knox, Chairman	✓		

HOUSE STANDING COMMITTEE REPORT

March 15, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that Senate Joint Resolution 24 (third reading copy -- blue) be concurred in as amended.

Signed: _____

Dick Knox
Dick Knox, Chair

And, that such amendments read:

Carried by: Rep. Fagg

1. Title, line 6.

Strike: "DEPARTMENT OF STATE LANDS"

Insert: "FORESTRY OFFICE OF THE MONTANA COOPERATIVE EXTENSION
SERVICE OF MONTANA STATE UNIVERSITY"

2. Page 1, line 25.

Strike: "Department of State Lands"

Insert: "Forestry Office of the Montana Cooperative Extension
Service of Montana State University"

-END-

Committee Vote:
Yes ☐, No ☐.


34
3/15/93
11:25
580956SC.Hpf

HOUSE STANDING COMMITTEE REPORT

March 15, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report
that Senate Bill 231 (third reading copy -- blue) be concurred
in .

Signed: 
Dick Knox, Chair

Carried by: Rep. Brooke

Committee Vote:
Yes ___, No ___.

37
3/15/93
581003SC.Hpf

HOUSE STANDING COMMITTEE REPORT

March 15, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report
that Senate Bill 104 (third reading copy -- blue) be concurred
in .

Signed: _____

Dick Knox

Dick Knox, Chair

Carried by: Rep. Feland

Committee Vote:
Yes 11, No 0.

3/15/93 1:30
581004SC.Hpf

Commissioners
Kay McKenna, Mayor
Margaret Crennen
Tom Huddleston
Colleen McCarthy
Mike Murray



DATE 3-12-93
HB 261

City-County
Administration Building
316 North Park
Helena, MT 59623

Phone: 406/447-8000

William J. Verwolf
City Manager

City of Helena

March 12, 1993

Mr. Chairman and Representatives:

My name is Kathy Macefield and I am the planning director for the City of Helena. I am here today to speak on behalf of the City of Helena and in support of SB 261.

As a city planner, I am concerned about how the land surrounding the city is divided and developed, and the ability to grow in an orderly manner that's cost-effective for the taxpayers -- in both the short-term and the long-term.

Although very little land is divided into 20-acre tracts or as an occasional sale within the city, a significant portion of Lewis and Clark County has been divided this way. Since the legislature has been in session, 230 20-acre tracts have been submitted by certificate of survey, compared to 14 lots that have been proposed through subdivision review, *in Lewis and Clark County.*

Subdivision review means facilitating the division and development of land in a responsible manner that is not harmful to the environment or to the property owners. With subdivision review, how the land development will affect wildlife, agriculture, public health and safety, and the environment can be considered.

Subdivision review also provides a way to address how the adjacent property owners will be affected, including how and where roads will be constructed and connected, how stormwater drainage will be accommodated so the downhill neighbor is not flooded, and how fire protection will be provided to limit the potential for spreading fire for example. The future buyer of the subdivided property will know who maintains the road serving the lot, whether or not water and sewer can be provided, and how close the school bus travels to the area, and what the plans are for the rest of land in the subdivision.

As a technical point, sanitary review only addresses whether or not a septic system and replacement field, or if public sanitary sewer service, can be installed to serve the property. These other development issues are not addressed during sanitary review.

SB 261 increases the size threshold and eliminates the occasional sale which are the two largest problems or loopholes in the existing law. SB 261 provides simple amendments to existing law to correct the problems and benefits Montana's citizens.

I ask you to please pass SB 261 as it has been submitted to you. Thank you.

Sincerely,

Kathy Macefield

Kathy Macefield

PRESIDENT
Thomas E. Sands
1995 3rd Ave. E.
Kalispell, MT 59901
(406) 755-6481

VICE-PRESIDENT
Glenn R. Howard
3201 Russell Street
Missoula, MT 59801
(406) 721-4320



P.O. Box 4112
Missoula, Montana 59806

PRESIDENT-ELECT
Daniel P. Brien
P.O. Box 225
Somers, MT 59932
(406) 857-3563

SECRETARY-TREASURER
Linda S. Smith
1935 3rd Ave. E.
Kalispell, MT 59901
(406) 755-5401

EXHIBIT 2
DATE 3-12-93
HB 261

POSITION STATEMENT OF THE MONTANA ASSOCIATION OF REGISTERED LAND SURVEYORS
REGARDING SENATE BILL 261
PREPARED FOR THE HOUSE NATURAL RESOURCES COMMITTEE HEARING, MARCH 12, 1993

1. Professional Land Surveyors are licensed in the State of Montana and required by that state licensure to conduct and perform land surveys in conformance with the provisions of the Montana Subdivision and Platting Act (MSPA).
2. Professional Land Surveyors registered in Montana are the ONLY professionals required by law to implement the requirements of the MSPA. They are consultants to public and private entities with respect to the requirements for such implementation. Professional Land Surveyors are charged with the protection of the public welfare.
3. The Montana Association of Registered Land Surveyors (MARLS) is an organization of registered Professional Land Surveyors duly registered in Montana according to law. MARLS represents 136 of the 167 registered Professional Land Surveyors residing in Montana, (78%).
4. The Montana Subdivision and Platting Act has as its stated purpose, the interest, promotion and protection of the public health, safety and general welfare.
5. The general welfare of the public includes the welfare of the owners of land in Montana, and includes the fundamental rights of those owners to reside, use, enjoy, buy and sell the land, in whole or in part. The general welfare concept also includes the responsibility of state and local governments to serve the constituents they represent, who in fact constitute "the public".
6. The 1993 Montana Legislature has before it, Senate Bill 261, a proposed amendment to the MSPA. S.B. 261 effectively eliminates the basic and fundamental property rights of Montana's landowners, and transfers those property rights to the power and administration of local government.
7. S.B. 261 is based on "perceived" problems, rather than actual fact. Therefore, the S.B. 261 does not adequately or accurately identify or address the current problems in Montana nor the solutions to those problems. S.B. 261 assumes that private landowners are the problem, and that government is the solution to those problems, and this to the exclusion of private landowner rights.

8. S.B. 261 provides neither protection nor assurances to either the private landowner or to local governments. The tenets of S.B. 261 are so one-sided that litigation is assured against local governments by landowners, thus increasing the cost of government and the burden on taxpayers.
9. By these attitudes and subsequent doctrines, S.B. 261 violates the basic statement of purpose of the MSPA to protect the public welfare.
10. For the above stated reasons, the Montana Association of Registered Land Surveyors opposes Senate Bill 261 as currently drafted, as it is not in the public interest, nor is it beneficial or protective of the general welfare, as is required by law.
11. MARLS proposes as its only conscionable amendment to S.B. 261, a complete re-write to include all of the provisions of Senate Bill 343, which is currently tabled in the Senate Natural Resources Committee. If this amendment is not fully accepted, MARLS urges the House Natural Resources Committee to kill Senate Bill 261.

EXHIBIT 3
DATE 3-12-93
HB 26

History: En. Sec. 1, Ch. 500, L. 1973; R.C.M. 1947, 11-3859.

(15) "Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles or mobile homes.

Cross-References

76-3-104. What constitutes subdivision. A subdivision shall comprise only those parcels less than 20 acres which have been segregated from the original tract, and the plat thereof shall show all such parcels whether contiguous or not.

CHAPTER 4

Part 1

Part Cross-References
Solid waste disposal exception, 75-10-214.

76-4-101. Public policy. It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife.

History: En. Sec. 148, Ch. 197, L. 1967; amd. Sec. 1, Ch. 509, L. 1973; R.C.M. 1947, 69-5091.

76-4-102. Definitions. As used in this part, unless the context clearly indicates otherwise, the following words or phrases have the following meanings:

(13) "Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, which provides permanent multiple space for recreational camping vehicles or mobile homes.

76-4-103. What constitutes subdivision. A subdivision shall comprise only those parcels of less than 20 acres which have been created by a division of land, and the plat thereof shall show all such parcels, whether contiguous or not. The rental or lease of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a subdivision, as that term is defined in this part, and is not subject to the requirements of this part.

History: En. Sec. 149, Ch. 197, L. 1967; amd. Sec. 2, Ch. 509, L. 1973; amd. Sec. 1, Ch. 529, L. 1975; amd. Sec. 2, Ch. 557, L. 1977; R.C.M. 1917, 69-5002(part); amd. Sec. 2, Ch. 592, L. 1985.

EXHIBIT 4

DATE 3-12-93

HB 26

No. 88-211

IN THE SUPREME COURT OF THE STATE OF MONTANA

1988

THE STATE OF MONTANA, ex rel.,
TAMMY L. LEACH and CRAIG S. LEACH,
GREGORY LEACH, and SUSAN LEACH,

Petitioners and Appellants,

-vs-

WILBUR VISSER, JANE JELINSKI, and
RAMON S. WHITE, THE GALLATIN COUNTY
BOARD OF COMMISSIONERS,

Respondents and Respondents.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and for the County of Gallatin,
The Honorable Thomas A. Olson, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Eula Compton, Bozeman, Montana

For Respondent:

A. Michael Salvagni, County Attorney, Bozeman,
Montana; James D. McKenna, Deputy County Attorney

Submitted on Briefs: Aug. 11, 1988

Decided: November 1, 1988

Filed:

FILED

NOV 1 1988

RECEIVED
MONTANA SUPREME COURT

Eula M. Compton

Clerk

NOV 02 1988

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

State law permits a single division of a parcel of land outside of platted subdivisions without a local subdivision review when the transaction is an occasional sale. An "occasional sale" means one sale of a division of land within any 12 month period. State law also limits a single division of a parcel of land if "the method of disposition is adopted for the purpose of evading" local subdivision review. Gallatin County has adopted Subdivision Regulation 2.b.(3)(b) to the effect that an occasional sale is an evasion of local subdivision review if "a parcel contiguous to the parcel to be transferred has been previously transferred by the same transferor as an occasional sale."

Tammy Leach proposed a division of a certain Tract 14 as an occasional sale. The tract of the proposed division was contiguous to a tract which had earlier been transferred as an occasional sale to Tammy Leach. On that basis, the District Court, Eighteenth Judicial District, Gallatin County, determined that the attempted division of Tract 14 did not qualify for an occasional sale of land and was not, therefore, exempt from local subdivision review. The District Court denied a petition for a peremptory writ of mandamus.

We determine here that Gallatin County Subdivision Regulation 2.b.(3)(b) directly conflicts with the provisions of § 76-3-207, MCA, permitting single divisions of land parcels outside of platted subdivisions when they qualify as occasional sales. We therefore reverse and remand this cause with directions to the District Court to issue a writ of mandate to the respondents to permit the proposed division of land.

EXHIBIT

4

DATE

3-12-93

HB261

The findings of fact of the District Court adequately describe the problem. In 1981, the Leach family purchased 265 acres of land in Gallatin County. A 20-acre tract within the purchase, Tract 12, was divided without subdivision review in 1983 into two 10-acre tracts. Tract 12B was conveyed away. In 1984, Tract 13 was divided without local subdivision review into two 10-acre tracts and Tract 13A was conveyed away. In May, 1985, petitioner Tammy Leach acquired Tract 13B. In 1984, the Leach family conveyed Tract 14 to Craig, Don, Gloria and Tammy Leach. Later, in 1984, Tract 14 was sold to petitioners Gregory and Susan Leach. The present controversy involves an attempt to divide Tract 14. Petitioner Tammy Leach would become the owner of Tract 14A. In 1986, the proposed division of land of Tract 14A to Tammy Leach was rejected by the County Commission because the proposed transfer was contiguous to the transfer of Tract 13B; and so under the Gallatin County subdivision regulations did not qualify as an "occasional sale." Another request for the transfer of Tract 14A to Tammy Leach was considered by the County Commission and denied in February, 1987.

The decision of the County Commission not to approve the division of land proposed by the Leaches was conveyed to them by a letter signed by the Commissioners, dated February 25, 1987. The letter recited the history of the transfers of the tracts as above enumerated and pointed out that the county subdivision rules "do not allow a parcel contiguous to the parcel to be transferred if it has been previously transferred by the same transferor as an occasional sale." Based on that history, the Commission "determined that the method of disposition of the land was adopted for the purpose of evading the requirements of Title 73, Ch. 2, Pt. 2, MCA (the local subdivision review requirements).

The petitioners filed an action in the District Court for a writ of mandate directing the County Commission to permit the division of land as proposed. The District Court, after entering findings of fact and conclusions of law, denied the petition for peremptory writ of mandamus on January 23, 1988. From that order of denial the petitioners have appealed to this Court.

The issues presented by the Leaches are:

1. In accordance with §§ 76-3-207 and 76-3-103(7), MCA, a landowner may enter into one occasional sale each and every year without the sale or a series of sales being deemed subject to local subdivision review.

2. The Gallatin County Subdivision regulation is void as eliminating the statutory exemption for occasional sales.

3. Gallatin County's subdivision regulations violate the Montana and United States Constitutions.

In answer, the Commission contends that: (1) the Gallatin County subdivision regulations are reasonable and not in conflict with state law; (2) the County Commission is given discretion to determine whether a proposed division of land is for the purpose of evading the Subdivision and Platting Act; and, (3) the constitutional arguments should not be considered because they were not presented in the District Court.

The principal issue in this case is controlled by our decision in *State of Montana ex rel. Swart v. Casne, et al.* (1977), 172 Mont. 302, 564 P.2d 983. In that case, the same provisions now contained in § 76-3-207, MCA, and § 76-3-103(7), MCA, were involved, though contained in earlier numbered statutes. In that case, Gallatin County had adopted a regulation to the effect that the exemption contained in [§ 76-3-207] did not apply to the resubdivision or redesign of a subdivision platted or filed with the clerk and recorder.

EXHIBIT 4

DATE 3-12-93

143261

Swart owned five lots in a platted subdivision which he had proposed to divide by drawing a straight line dividing each lot into substantially equal parts, and transferring one of the halves as an occasional sale of the property. His proposal was denied by the County Commission, and he applied to the District Court for a writ of mandate, directing the Commission to permit the division. The District Court granted a writ of mandate, and the decision was affirmed on appeal to this Court. In affirming, this Court said:

These regulations are in direct conflict with the provisions of the Subdivision and Platting Act heretofore set forth in § [76-3-207]. They eliminate the statutory exemption as applied to "resubdivisions or redesign" of platted and recorded subdivisions. They require an amended plat reviewed and approved by the governing body to be filed with the clerk and recorded in direct contradiction to the statutory exemption. They engraft additional and contradictory requirements on the statute in the guise of implementing the evasion of statutory requirements. They frustrate the purpose of the "occasional sale" exemption of the Act. As such, the . . . regulations are void on their face. See *Bartels v. Miles City*, 145 Mont. 116, 399 P.2d 768. It is axiomatic that a statute cannot be changed by administrative regulation. See *Begay v. Graham*, 18 Ariz. App. 336, 501 P.2d 964.

172 Mont. at 308, 564 P.2d at 986.

In this case, we are faced with the exact problem that came before this Court in Swart. Here, the earlier divisions of tracts qualified as occasional sales because more than 12 months elapsed between each division of the parcels. In the case directly before us, the transfer to Tammy Leach has been refused because it is contiguous to a tract that had earlier qualified as an occasional sale, although in the present case, more than a year has elapsed from the time of the earlier transfer. The effect of the contiguous tract

provision in the Gallatin County Subdivision Regulations is, in the words of Swart, to "engraft additional and contradictory requirements on the statute in the guise of implementing the evasion of statutory requirements." The Gallatin County regulation is therefore impermissible because, in the language of Swart:

This grant of authority does not include the right to promulgate regulations in direct conflict with the Act. Where, as here, the Act provides for exemption of occasional sales from the subdivision requirements, DCA cannot prescribe subdivision regulations eliminating the exemption for the reasons heretofore stated. An administrative agency is not a "super legislature" empowered to change statutory law under the cloak of an assumed delegated power.

172 Mont. at 308-09, 564 P.2d at 986.

For the same reasons, the contention of the County Commission that it has discretion to determine whether the method of disposition is adopted for the purpose of evading § 76-3-207, MCA, has no merit. Plainly, under our statutes, a landowner is permitted a single division of a parcel outside of a platted subdivision if the division and any other division do not occur within any 12 month period. The County Commission has no discretion to deny a division of land if the landowner otherwise complies with the exemptions provided to him under the statutes for a single division of land.

There is no need to address the constitutional issues raised by the Leaches since we determine that the county regulation is void.

The Commission, however, further contends that a declaratory judgment rather than a writ of mandate is a proper remedy in this cause. The County Commission points to decisions in other states which hold that a declaratory judgment action is a proper method of challenging a zoning

ordinance and that a writ of mandamus in this case is inappropriate since the county had no legal duty to disregard its own regulations. Again, this contention was answered in Swart:

Here there was a clear legal duty the defendants were required to perform for the reasons heretofore stated. A declaratory judgment action would not necessarily get the certificate of survey filed in the light of previous difficulties between petition and the clerk and recorder in getting such certificates filed as evidenced in State ex rel. Swart v. Stuckey, supra. A declaratory judgment action would not make petitioner whole as attorneys fees are not allowable in such an action. A writ of mandate is the only remedy available to secure the ultimate relief sought by the petitioner--to compel the lifting of sanitary restrictions, the filing of a certificate of survey, and an award of relator's attorney fees.

172 Mont. at 309, 310, 564 P.2d at 987.

In order for the petitioners to obtain complete relief, a writ of mandate is proper in this cause. Accordingly, we reverse and remand to the District Court with instructions to issue a writ of mandate directed to the County Commission to permit the division of land as proposed by Tammy Leach, and for such other relief as may be appropriate for a writ of mandate in this cause.

John W. Shelby
Justice

We Concur:

J. A. Turnage
Chief Justice

John Conway
Commissioner

L. C. Robertson,
William E. Hest
R. C. McHenry
Justices

EXHIBIT 4
DATE 3-12-93
W0261

SUBDIVISION EXEMPTION APPLICATION

Name		
Address		Telephone
City	State	Zip

If you have ever used any of the listed exemptions check the appropriate box below	Exemptions	Check the appropriate exemption being requested
	Occasional Sale	
	Mortgage Release	
	Agric. Exemption	
	Gift or Sale to Family Member	
	Relocation of a Common Boundary	

1/4 Section 1 Township 1 North/South Range 1 West
Parcel Number: 1 of parcel being created.

1. Have you in the past created a major or minor subdivision in Ravalli County? Yes/No
2. Have you ever used the above listed exemptions before? Yes/No
3. If your answer to question 2 is "Yes" please complete the following for each exemption used. (attach separate sheet if necessary)
 - A. Exemption used: _____
 - B. Location: 1/4 Section 1 Township 1 North/South Range 1 West
 - C. Number and date of the plat filed. COS# _____ Date _____
 - D. Number of parcels under 20 acres on the plat. _____
 - E. Disposition of each parcel. _____

4. Give reason you choose to use the requested exemption. _____

5. Please answer the following questions that pertain to the exemption you are applying for.
 - A. Occasional Sale request: Have you ever created a previous occasional sale that remains unsold? Yes/No

B. Gift or Sale to Family Member request: Have you ever made a previous gift or sale to the same family member in Ravalli County? Yes/No

C. Mortgage Release/construction financing request:

1. Will it create more than one building site on the original acreage? Yes/No
2. Is the loan being obtained for construction on the exempted parcel? Yes/No
3. Why does the financing agency require the division of land for this particular loan? _____

6. Please attach (preferably to scale) a sketch plan of the original parcel and the proposed division. Please give a point of direction on your drawing.

Signature

Signature

STATE OF MONTANA)

County of Ravalli)

_____, being first duly sworn, deposes and says:

That he (she or they) has read the foregoing answers and that the same are true and correct to the best knowledge of affiant.

Dated this _____ day of _____, 19____.

Notary Public for the State of Montana
Residing at _____
My Commission expires _____

(Seal)

Wenison

C/S 2354 M. Trust 1
YELLOWSTONE COUNTY
CERTIFICATE OF SURVEY REVIEW

EXHIBIT 4
DATE 3-12-93
HB 261

1. **PLANNING DEPARTMENT**

Date Received: 8-27-92

Reviewed By: Dan Miles

Approved: ☒ Denied ☐

Comments:

2. **COUNTY SURVEYOR**

Date Received: 8/29/92

Reviewed By: [Signature]

Approved: ☒ Denied ☐

Comments:

RECEIVED

AUG 28 1992

YELLOWSTONE COUNTY
SURVEYOR'S OFFICE

3. **COUNTY TREASURER**

Date Received: 9-4-92

Reviewed By: R. Schumdt

Approved: ☒ Denied ☐

Comments:

4. **COUNTY ATTORNEY**

Date Received: 8/8/92

Reviewed By: [Signature]

Approved: ☒ Denied ☐

Comments:

5. **CLERK & RECORDER**

Date Received:

Reviewed By:

Approved: ☐ Denied ☐

Comments:

RESOLUTION 509B
RESOLUTION ADOPTING CRITERIA FOR
LOCAL DETERMINATION OF EVASION OF THE
SUBDIVISION AND PLATTING ACT

WHEREAS, the Board of County Commissioners, Flathead County, Montana, deems it necessary to rescind and supersede Resolution 509 adopted the 23rd day of April, 1984, and amended by Resolution 509A on February 23, 1989. Therefore, Resolution 509A is rescinded and superseded as follows:

WHEREAS, the State of Montana provides that certain divisions of land, which would otherwise constitute subdivisions, are exempt from local subdivision review and approval, unless the transactions are an attempt to evade the Montana Subdivision and Platting Act, Section 76-3-101 M.C.A. et. seq.; and

WHEREAS, the exemptions from subdivision review under Sections 76-3-201 through 76-3-207, M.C.A., are intended to relieve a landowner from the requirements of local review when the division of land either creates no additional building sites (agricultural exemption or boundary line adjustment) or creates so few building sites that only minimal impact will likely result; and that the purpose of the exemptions is not to provide a means of creating numerous building sites without subdivision review, but rather to deal with the exceptional circumstances when plenary subdivision review is unnecessary; and

WHEREAS, the proper use of an exemption will not compromise or conflict with the purpose of the Subdivision and Platting Act which is to promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and will not compromise or conflict with the purpose of the Flathead County Subdivision Regulations which is to provide for the enforcement and administration of subdivision

regulations reasonably providing for the orderly development of Flathead County; for the coordination of roads within subdivided land with other roads, both existing and planned; for the dedication of land for roadways and for public utility easements; for the improvement of roads; for the provision of adequate open space for travel, light, air, and recreation; for the provision of adequate transportation, water, drainage, and sanitary facilities; for the avoidance or minimization of congestion; and for the avoidance of subdivisions which would involve unnecessary environmental degradation and the avoidance of danger of injury to health, safety, or welfare by reason of natural hazard or the lack of water, drainage, access, transportation, or other public services or would necessitate an excessive expenditure of public funds for the supply of each service; and

WHEREAS, the likelihood that land development problems will occur greatly increases when building sites are created without public review and are further divided without review; and

WHEREAS, Flathead County has established the necessary procedures for expeditious review of land divisions creating five or fewer parcels and thus has diminished the justification for avoiding review through use of exemptions; and

WHEREAS, the Board of County Commissioners of Flathead County, Montana, has the authority and duty to evaluate and determine from all the circumstances whether the proposed division of land is based on a purpose to evade subdivision review requirements; and

WHEREAS, it is in the best interest of Flathead County to establish procedures, criteria and requirements for the review of certificates of survey claiming an exemption to the Act.

THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Flathead County, Montana, that the following procedures, criteria, and requirements, shall be considered in determining whether the claim of an exemption from subdivision review is made for the purpose of evading the Act:

1. PROCEDURE AND GENERAL REQUIREMENTS

Any person seeking exemption from the requirements of the regulations and from the requirements of the Act, shall

furnish evidence of entitlement to the claimed exemption. The landowner shall sign a statement provided by the County and intended to provide all the information required by this resolution. The statement shall be filed with the Certificate of Survey, unless otherwise not required, creating the parcels subject to exemption.

For those parcels for which an exemption from subdivision review is claimed, a paper copy of the Certificate of Survey, in final form, and the required statement shall be submitted to the Clerk and Recorder of Flathead County. The Clerk and Recorder shall have five (5) working days to review the submitted documents. The Clerk and Recorder shall review the submitted documents with representatives of the Flathead Regional Development Office, Flathead County Health Department and the Flathead County Attorney's Office.

If the Clerk and Recorder determines that the claimed exemption may constitute an evasion of the Act under this Resolution, the Clerk and Recorder shall notify the landowner or surveyor within five days stating in writing the reason leading to such a determination. Thereafter, the landowner may withdraw the instrument or may request within five days in writing that he/she be given a hearing before the Board. The Flathead Regional Development Office shall receive a copy of the notification to the landowner.

If the Clerk and Recorder does not make such determination and the instrument otherwise complies with all laws, the instrument is eligible for recording.

Upon receipt of the written request for hearing, the Board shall set a time and place for the hearing and inform the landowner thereof. The Flathead Regional Development Office shall provide an evaluation and recommendation on the subject instrument. At the hearing, the landowner may present any additional evidence in support of the claim of exemption. The Board shall approve or disapprove the

proposed exemption within thirty (30) days of the receipt of request for hearing. The Board shall provide written notification of its decision to the landowner or surveyor and the Clerk and Recorder. If the proposed exemption is approved, the Board shall notify the Clerk and Recorder that the instrument is deemed not to be an evasion of the Act. If the proposed exemption is disapproved, the Board shall instruct the Clerk and Recorder not to file the instrument.

2. CRITERIA FOR REVIEW OF EXEMPTION

The question of whether an exemption is claimed "for the purpose of evading" review under the Act shall be decided by the Board taking into consideration all of the surrounding circumstances which may include but are not limited to the nature of the claimant's business, the prior history of the particular tract in question, the proposed configuration of the tracts if the proposed exempt transactions are completed and any pattern of development by use of exempt land divisions which will result in the equivalent of a subdivision without local government review.

a. PATTERN OF DEVELOPMENT

The scope of review of a pattern of development shall apply to the creation of a division of land or multiple divisions of land by use of or proposed use of an exemption(s).

Original Tract Less Than Twenty Acres: A pattern of development occurs whenever more than three parcels (i.e., two exempt parcels and a remaining parcel) have been divided from the original tract of less than twenty acres regardless of ownership by use of exemptions of the Act.

Original Tract Twenty Acres Or More: A pattern of development occurs whenever more than four parcels (i.e., three exempt parcels and a remaining parcel) have been divided from the original tract of twenty acres or more, regardless of ownership, by use of exemptions of the Act.

A pattern of development may be evidenced by the use of exemption(s) contiguous to platted lots where common roads

are shared or the exempted tracts have similar shape or size to the platted lots, or the exempted tracts are being created by the same landowner who created the platted lots.

b. EXEMPTION AS A GIFT OR SALE TO A MEMBER OF THE IMMEDIATE FAMILY (Section 76-3-207(1)(b))

- (1) The proper use of the exemption as a gift or sale to a member of the immediate family is to convey one parcel of land to a member of the landowner's immediate family for the benefit of the grantee.
- (2) A proposed division of land as a family transfer may be declared to be an evasion of the Act if it is determined that one or more of the following conditions exist:
 - (a) the proposed new parcel would result in a pattern of development;
 - (b) the use of this exemption creates more than one (1) additional parcel of less than twenty (20) acres in size;
 - (c) the division is made for the purpose of speculation by the grantor; or
 - (d) the transfer is the second or subsequent family transfer of property owned by the grantor to the same member of the immediate family.

c. EXEMPTION AS AN OCCASIONAL SALE (Section 76-3-207(1)(d))

- (1) A proposed division of land as an occasional sale may be declared to be an evasion of the Act if the proposed new parcel would result in a pattern of development.

d. RELOCATION OF COMMON BOUNDARY LINES (Section 76-3-207

(1)(a))

- (1) The proper use of the exemption for relocating common boundary lines is to establish a new boundary between adjoining parcels of land.
- (2) Certificates of Survey showing the relocation of common boundary lines must be accompanied by a quit claim or warranty deed from adjoining property owners

for the entire newly described parcel(s) or that portion of the tract(s) that is being effected.

- (3) A proposed relocation of common boundary lines may be considered an evasion of the Act if it is determined that:

(a) the documentation submitted does not support the stated reason for relocation; or

(b) it creates a parcel of less than 20 acres which, prior to the relocation had more than 20 acres.

SECURITY FOR CONSTRUCTION FINANCING (Section 76-3-201(2))

- (1) The proper use of the exemption is to provide security for construction mortgages, liens, or trust indentures and not for contracts for deed.

- (2) Prior to filing any COS or upon the filing of any other document purporting to create a division of land under twenty acres by use of this exemption, the COS shall be reviewed under the procedure set forth in Section 1. Any other document shall be reviewed under the procedure set forth in Section 1.b.

- (3) A proposed transfer based on the assumption to provide construction security may be determined to be for the purpose of evading the Act under the following conditions:

(a) it will create more than one parcel from the original tract under twenty acres;

(b) the financing is for construction or improvements on land other than the exempted parcel;

(c) the person named in the "statement explaining who would have possession of the remainder parcel if the title to the exempted parcel was conveyed" is anyone other than the landowner;

(d) title to the exempted parcel is not initially obtained by the lending institution or mortgagee if foreclosure occurs;

(e) there exists a prior agreement to default or a prior agreement to purchase only a portion of the

original tract;

(f) there is more than one construction mortgage, lien or trust indenture that proposes to or would create more than one new parcel on the tract; or

(g) the mortgagee, lien holder or beneficiary is not a lending institution.

(4) When the security for construction financing exemption is to be used, documents shall be submitted, in addition to such other documents as may be required, to the Clerk and Recorder:

(a) explaining how many parcels within the original tract will be created upon foreclosure/default;

(b) explaining who will have title to and possession of the remainder of the original parcel after title to the exempted parcel is conveyed; and

(c) Including a signed statement from a lending institution or mortgagee that the creation of the exempted parcel is necessary to secure a construction loan for buildings or other improvements on the parcel.

(5) At the time the deed creating the division of land is filed, all instruments/documents including the statements described in Section 2.e.(4) shall be presented to the Clerk and Recorder.

(6) Once the loan for construction mortgage, lien or trust indenture has been satisfied, the exemption is no longer applicable and the boundaries delineating the exempt parcel are extinguished and the acreage previously identified reverts back into the acreage of the initial parcel. This will be accomplished by the filing of the warranty deed for the parent parcel when the conditions of the contract are satisfied, in the event that the parcel is being purchased in that manner.

COURT ORDER (Section 76-3-201(1))

(1) A COS using this exemption must be accompanied by a

copy of the court order.

C. DEFINITIONS

a. The following definitions, in combination with those contained in the Montana Subdivision and Platting Act and those contained in the Flathead County Subdivision Regulations, shall apply:

- (1) Act: Montana Subdivision and Platting Act.
- (2) Board: Board of County Commissioners of Flathead County.
- (3) Grantee: The person or entity who buys or otherwise receives the title to or possession of the of the parcel which has been segregated from the original tract.
- (4) Grantor: The person or individual who sells, rents, leases or otherwise conveys the title to or possession of the parcel which has been segregated from the original tract.
- (5) Landowner: The owner of the property or his/her agent.
- (6) Original Tract: All tracts of land held in single and undivided ownership on July 1, 1973, as indicated by the official records filed with the Flathead County Clerk and Recorder.
- (7) Regulations: Flathead County Subdivision Regulations.

4. SEVERABILITY

If any provision of these regulations or the application thereof to any person or circumstance are found invalid for any reason whatsoever, the invalidity shall not affect other provisions or applications of the regulations which can be given effect without the invalid provision or application, and to this end the provision of these regulations are declared to be severable.

DATED this 30th day of October, 1990,

BOARD OF COUNTY COMMISSIONERS
Flathead County, Montana

By [Signature]
Howard W. Gipe, Chairman

ATTEST:
Susan W. Haverfield, Clerk

By [Signature]
Allen A. Jacobson, Member

By [Signature]
Deputy

By [Signature]
Mary E. Atkins, Member

Original Resolution Adopted: April 23, 1984

Amended: February 23, 1989

Amended: CARVER 30, 1990

EXHIBIT 4
DATE 3-12-93
HB 261

MISSOULA COUNTY
CERTIFICATE OF SURVEY REVIEW PROCEDURE AND CRITERIAEXHIBIT 4
DATE 3-12-93HB 261

I. General Requirements

- A. Any person seeking exemption from the requirements of the Subdivision and Platting Act shall complete and sign before a notary public the Exemption Affidavit, a copy of which is attached and incorporated herein.
- B. Any person seeking exemption may request a determination of his or her entitlement to use the exemptions claimed prior to submitting a Certificate of Survey or deed for review and/or recording by submitting a completed Affidavit and sketch of the proposed division(s) to the Designated Review Agent.
- C. Definitions
1. Agricultural exemption: divisions made for lease or rental for farming or agricultural purposes or divisions made outside platted subdivisions by sale or agreement to buy and sell where the parties to the transaction enter into a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes. Any change in use of the land from agricultural purposes subjects the land to the provisions of the regulations.
 2. Family transfer exemption: division made for the purpose of gift or sale to an immediate family member including spouse, children, or parents.
 3. Lot Aggregation: a division of land which redesigns or rearranges five or fewer lots or which aggregates multiple lots into five or fewer lots.
 4. Occasional sale exemption: one sale of a division of land within any 12-month period. Only one (1) occasional sale may be made within any 12-month period from any tract or from contiguous tracts held in single or undivided ownership or from the remaining portion of a tract divided by occasional sale.
 5. Relocation of common boundary exemption: division made for the purpose of relocating common boundary lines between adjoining properties and not for the purpose of creating a new parcel of land transferrable to anyone other

RESOLUTION 509B
LANDOWNER STATEMENT

EXHIBIT 4

DATE 3-12-93

HO 261

1. EXEMPTION CLAIMED:

- / / Gift or Sale to Member of Immediate Family
- / / Occasional Sale
- / / Relocation of Common Boundary Lines
- / / Agricultural Exemption
- / / Security for Construction Financing
- / / Other (Specify) _____
- / / Court Order (Attach Copy) _____

2. The original tract is the tract existing on July 1, 1973, from which the proposed tract was divided or of which the proposed tract was a part on July 1, 1973. The number of exemptions previously used or claimed on the original tract regardless of ownership: _____. Please list each COS and Exemption claimed:

COS _____	Exemption Claimed _____
COS _____	Exemption Claimed _____
COS _____	Exemption Claimed _____
COS _____	Exemption Claimed _____
COS _____	Exemption Claimed _____

Has this parcel been subject to or part of an application for plat approval within the last five years: _____.

3. I certify as follows:

a) if gift or sale to member of immediate family: that the proposed transfer is to a member of my immediate family, for the benefit of the grantee and not for the purpose of speculation by me, and is the first such transfer to this family member;

b) if security for construction financing: that the property division upon foreclosure will not create more than one new parcel, that I will retain possession of the remainder and the mortgagee will obtain possession of the exempted parcel, and there exists no prior agreement to default or to purchase only a portion of the original tract;

c) that the use of the claimed exemption is not for the purpose to evade subdivision review of the Montana Subdivision and Platting Act.

DATE: _____

Landowner: _____

Landowner's Agent
State Relationship: _____

3/1/92

FLATHEAD REGIONAL DEVELOPMENT OFFICE
FEE SCHEDULE

AS APPROVED BY THE COUNTYWIDE ADMINISTRATIVE BOARD ON MAY 26, 1992
EFFECTIVE JULY 1, 1992

SUBDIVISION REVIEW

PRE

PRELIMINARY PLAT REVIEW:

Major Subdivision..... (6 or more lots)	\$450 + \$10/lot
Minor Subdivision..... (5 or fewer lots)	\$250 + \$10/lot
Condominiums..... (6 or more units)	\$450 + \$10/unit
(5 or fewer units) (land is not subdivided)	\$250 + \$10/unit
Mobile Home Parks & Campgrounds..... (6 or more spaces)	\$450 + \$10/space
(5 or fewer spaces) (land is not subdivided)	\$250 + \$10/space
Recorded Preliminary Plat.....	\$200

REVISED PRELIMINARY PLAT:

Mobile Home Parks, Campgrounds, and Condominiums (minor subdivision).....	\$150 + \$10/unit
Mobile Home Parks, Campgrounds, and Condominiums (major subdivision).....	\$250 + \$10/unit

FINAL PLAT REVIEW:

For minor subdivisions with approved preliminary plat.....	\$200 + \$10/lot
For major subdivisions with approved preliminary plat.....	\$300 + \$10/lot
For subdivisions with waiver of preliminary plat.....	\$120 + \$10/lot

MASTER PLAN:

Amendment to Plan.....	\$750
------------------------	-------

ANNEXATION:

Annexation (includes initial zone for Kalispell).....	\$250
--	-------

LAKEWARE CONSTRUCTION PERMIT:

Residential:

Permit.....	\$25
"After the Fact" Permit.....	\$40
Variance - Minor.....	\$50
Variance - Major.....	\$60

Homeowners Association*/Commercial:

Permit.....	\$50
"After the Fact" Permit.....	\$100
Variance - Minor.....	\$100
Variance - Major.....	\$150

* Three or more homeowners

than an adjoining property owner.

6. Security Interest exemption: division of land to provide security for construction mortgages, liens, or trust indentures.

II. Procedure

- A. All Affidavits, Surveys, Deeds or other documents claiming entitlement to use an exemption shall be submitted first to the Designated Review Agent in the County Attorney's Office.
- B. The use of exemptions under any of the circumstances listed in Section III A shall be referred to the Board of County Commissioners for their determination on whether the use of exemptions is an evasion of the Subdivision Act.
- C. All other circumstances shall be certified on the Affidavit as having been reviewed by the Designated Review Agent and notice given to the applicant and the Clerk and Recorder.
- D. For exemptions referred to the Board of County Commissioners:

1. The Board of County Commissioners shall conduct a hearing to allow the claimant an opportunity to present evidence showing that he is entitled to claim exemptions from the requirements of the Subdivision Act.

2. The Board will notify the claimant of the date, time, and place of the hearing and may exercise its subpoena power to require the testimony or physical evidence in the possession of any person having knowledge of the proposed divisions, prior, or future divisions and transfers.

3. The Board will review the circumstances outlined in Sections III A and III B surrounding the divisions and transactions, and shall make written findings of fact and a determination that the claimant is or is not entitled to the exemption claimed, and shall so notify the claimant and the Clerk and Recorder..

4. If the Board determines that the claimant is not entitled to the exemption claimed and if the landowner proceeds to file the survey in question or to transfer title to or possession of tracts described by the survey, the board may direct the County Attorney to enforce the provisions of the Montana Subdivision and Platting Act. Nothing stated herein shall prevent the

County Attorney from taking any other appropriate action provided for in the Subdivision Act.

III Criteria

A. The use of exemptions under any of the following circumstances will require review before the Board of County Commissioners who will hold a hearing to provide the claimant an opportunity to prove his/her entitlement to use the exemptions:

1. General (applicable to all exemptions)

Notes:
The problem
of "remainders."

- a. Subsequent division of a tract created after July 1, 1974 in which more than one type of exemption ~~(including the use of a "remainder parcel" exemption)~~ is claimed by the same applicant or an applicant having a family or business relationship with another claimant in the same parent parcel.
- b. Subsequent division of a tract created after July 1, 1974 in which the proposed division will be sold under a common promotional scheme, connected to a common road, sewer, or water system or subject to restrictive covenants with other tracts created by using exemptions and which are part of the same parent parcel.
- c. Divisions of land where the land was included as part of a subdivision plat previously rejected.
- d. For purposes of this part, "subsequent division" includes only those divisions made using the "family gift," "occasional sale," and "remainder parcel" exemptions.
- e. Claimant has divided other property by using exemptions.
- f. The arrangement of the proposed divisions suggests an intention to create multiple lots.

Not enforceable
2242 A.G. Op. 16 (1987)

~~The proposed division and intended use of the parcel is not in substantial compliance with the adopted Comprehensive Plan.~~

2. Specific exemptions (applicable for specific exemption claimed)

a. Occasional sale

(1) See "General," above.

(2) Any occasional sale of a tract within 12 months of an occasional sale or family transfer of a portion of the same parent parcel or contiguous tract(s).

(3) A subsequent occasional sale of a tract created or remaining by use of the occasional sale and neither portion previously divided was conveyed by the claimant.

(4) Use of the occasional sale exemption in combination with other exemptions by the same claimant regardless of when the other exemption was taken.

b. Family gift or sale (family transfer)

(1) See "General," above.

(2) Use of family transfer in combination with other exemptions by the same claimant regardless of when the other exemption was taken.

(3) Family transfers in which the parent purports to act as a guardian for a minor child without a trust instrument.

(4) Family transfers to a family member who once made a gift of land under any exemption to the same claimant.

(5) Family transfers to grandchildren from a family member who received the same land as a gift from the grandchildren's parent.

(6) Second family transfer to the same family member and the first parcel was further divided by exemptions.

(7) Second gift to the same family member out of the same parent parcel by either the husband or the wife.

(8) Subsequent division using the family transfer exemption by a claimant who purchases from a donee or donee's successor in interest of a tract created by family transfer exemption.

c. Security interest (division created to provide security for construction mortgages, liens, or trust indentures)

(1) More than one security interest parcel created simultaneously by claimant out of same

parent parcel or created in any time span from the same claimant's ownership.

(2) Financing is not for construction on the parcel created. (*Refinancing is permissible*)

(3) Document creating security interest allows title to be transferred to a third party upon foreclosure.

(4) Reference descriptions created using family transfer exemptions in which the donee never acquired or disposed of the property.

(5) Documents creating the security interest must be filed with the survey — *wained if letter from lender accompanies affidavit*

d. Agricultural leases and/or uses

(1) See "General," above.

(2) More than one agricultural exemption per claimant's ownership, other than parcels leased to separate individuals.

c. Relocation of common boundary

(1) "General," above, not applicable.

(2) Documentation does not support the need, such as ~~structure encroachment~~ or ~~surveyor error~~.

(3) Relocation which would result in violation of the DHES Certificate of Approval of the tracts affected or which would decrease separation distance of wells and/or septic system from boundary lines as required in existing local and state health regulations, or which would reduce the size of a parcel formerly larger than 20 acres to smaller than 20 acres. Any relocation under this subsection must be approved by the applicable health agencies for compliance with sanitation regulations.

B. At the hearing, the Board of County Commissioners will consider all relevant circumstances in determining whether a survey or deed may be filed or whether a subdivision plat is required. Relevant circumstances may include:

1. Any of the circumstances outlined in Section III A above.

2. Conveyances of property back to the seller(s)

*Beyond
authority of
statute*

where exemptions were used by the buyer(s) to divide the property (State ex rel. Dept. of Health v. LaSorte, 182 Mont. 267, 596 P.2d 477 (1979)).

3. Divisions by court order in which the action before the court is made solely for the purpose of dividing property by prior agreement between the parties. (Beaverhead Co. v. Gillespie, Cause No. 10332, Fifth Judicial District, Judge Frank M. Davis, March 20, 1985).
4. Divisions of land where the land was included as part of a subdivision plat previously rejected (Barbara Withers v. County of Beaverhead, Cause No. 10098, Fifth Judicial District, Judge Leroy McKinnon, January 28, 1985).
5. Simultaneous filing of similar surveys for contiguous tracts of land, where there is a relationship between the subdivider and the surveyor and between the subdivider and the other claimants and where the subdivider is the one originating the surveys or transactions. (Martinsen v. Harding, Cause No. DV-80-294, Judge Jack L. Green, January 6, 1983).
6. Occasional sale used in combination with other exemptions. (Letter opinion of the Attorney General, Sept. 21, 1983; 40 A.G.Op. No. 16 (1983)).
7. Circumstances listed in 40 A.G.Op. No. 16 (1983):
 - a. Nature of claimant's business (i.e. whether claimant is in the business of dividing and selling land):
 - b. Prior history of the tract in question (i.e. whether this claimant has engaged in prior exempt transactions involving the tract):
 - c. Proposed configuration of the tract after the transaction is completed.
8. The transaction is not substantial. Although the following list is not exhaustive, some examples of substantial transactions are:
 - a. Family gifts or sales
 - (1) If the gift is to a minor, a separate trust managed by an independent trustee can ensure that control over the property is no

EXHIBIT

4

DATE

3-12-93

H9261

longer in the Grantor-parent. The terms of the trust should require that any proceeds from the sale of the property be used for the child's benefit.

(2) If the gift is to an adult child or spouse, separate accounts should be used to ensure that the privileges and responsibilities (including payment of taxes) are placed completely in the Donee and remain independent from the Donor.

(3) For family gifts in general, if further sales and divisions of the property are handled by the Donor-parent, or quick resale to a third party takes place, the transactions lack substantiality (Yellowstone Co. v. Ray Smith, Cause No. DV-78-1350, Yellowstone Co., Jan. 1980).

b. Construction mortgages, trust indentures, or liens

(1) If the purpose in giving the security interest is to set up a deliberate default to allow separation of title without a survey, sanitation review, or subdivision plat, the transaction lacks substantiality.

(2) If release deeds are given by the seller holding a security interest over the whole parcel and the parcel which is the subject of a release deed is resold to a third party, the transaction lacks substantiality.

6/26/85

EXEMPTION AFFIDAVIT

for claiming exemptions
from the Montana Subdivision and Platting Act
Missoula County, Montana

FAMILY TRANSFER EXEMPTION

Instructions: Please fill out the form completely and attach copies of documents as requested. Sign below before a notary public and submit this form, together with a sketch of the proposed division(s) or a preliminary certificate of survey or other document, to the County Attorney's Office.

Claimant's name, address and telephone

Agent's name, address and telephone (if agent used by claimant)

1. Proposed division of -----
(Certificate of Survey # or deed reference)

Other exemption proposed on the same survey -----

2. List all divisions of the tract existing as of July 1, 1974 of which your proposed division is a part and for each division provide the following information (attach additional sheets if needed):

a. Cert. of Survey # -----
or deed reference

b. Date survey filed -----

c. Name of person using -----
exemption

d. Exemption used -----

e. Is the tract contiguous to the one proposed to be divided? -----

Alternatively, attach copies of surveys creating exemptions and identify on the survey the relationship of the party filing the survey to the claimant.

3. Will the proposed tracts be served by a community sewer or water system, road system serving other divisions, be subject to restrictive covenants or offered for sale with other tracts which are part of those identified in Item 1 (above)? -----

Please specify -----

Book and page where covenants are recorded -----

4. Is the original tract of land part of a subdivision plat previously denied? -----

Family Transfer Exemption
Page 2

5. Have you divided other property using exemptions? _____
If so, provide survey number or deed reference _____
6. What is the intended use of the property and to whom (if known) will the tract(s) be transferred?

7. Relationship of Donor to Donee(s) _____
8. Age(s) of Donee(s) _____
9. Does Donee maintain a separate bank account for disposition and management of gifted tract? _____
10. Date and recording reference of previous gift or sale to each Donee named above _____
11. If Donee is under 18 years of age, has a separate trust been established? _____ Who is the trustee? _____
12. Has the Donee ever given or sold land to the Claimant? _____
Identify the tract by COS # or deed reference _____
13. Has the claimant or claimant's spouse ever divided, given or sold property to the same Donee under the Family Gift Exemption? _____ Identify the tract by COS # or deed reference _____
Was the property subsequently sold or divided? _____
14. Is the parcel proposed to be divided a parcel created by the Family Gift Exemption? _____ Identify the tract by survey number _____

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent

Claimant

License No., if applicable

Claimant

Claimant

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me the undersigned Notary Public, personally appeared _____

(claimants)
known to me (or proved to me on oath) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

Notary Public

Residing in _____

Commission expires _____

Family Transfer Exemption
Page 2

5. Have you divided other property using exemptions? _____
If so, provide survey number or deed reference _____
6. What is the intended use of the property and to whom (if known) will the tract(s) be transferred?

7. Relationship of Donor to Donee(s) _____
8. Age(s) of Donee(s) _____
9. Does Donee maintain a separate bank account for disposition and management of gifted tract? _____
10. Date and recording reference of previous gift or sale to each Donee named above _____
11. If Donee is under 18 years of age, has a separate trust been established? _____ Who is the trustee? _____
12. Has the Donee ever given or sold land to the Claimant? _____
Identify the tract by COS # or deed reference _____
13. Has the claimant or claimant's spouse ever divided, given or sold property to the same Donee under the Family Gift Exemption? _____ Identify the tract by COS # or deed reference _____
Was the property subsequently sold or divided? _____
14. Is the parcel proposed to be divided a parcel created by the Family Gift Exemption? _____ Identify the tract by survey number _____

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent

Claimant

License No., if applicable

Claimant

Claimant

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me the undersigned Notary Public, personally appeared _____

(claimants)
known to me (or proved to me on oath) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

Notary Public

Residing in _____

Commission expires _____

EXEMPTION AFFIDAVIT

for claiming exemptions
from the Montana Subdivision and Platting Act
Missoula County, Montana

OCCASIONAL SALE EXEMPTION

Instructions: Please fill out the form completely and attach copies of documents as requested. Sign below before a notary public and submit this form, together with a sketch of the proposed division(s) or a preliminary certificate of survey or other document, to the County Attorney's Office.

Claimant's name, address and telephone

Agent's name, address and telephone (if agent used by claimant)

1. Proposed division of _____
(Certificate of Survey # or deed reference)

Other exemption proposed on the same survey _____

2. List all divisions of the tract existing as of July 1, 1974 of which your proposed division is a part and for each division provide the following information (attach additional sheets if needed):

a. Cert. of Survey # _____
or deed reference

b. Date survey filed _____

c. Name of person using exemption _____

d. Exemption used _____

e. Is the tract contiguous to the one proposed to be divided? _____

Alternatively, attach copies of surveys creating exemptions and identify on the survey the relationship of the party filing the survey to the claimant.

3. Will the proposed tracts be served by a community sewer or water system, road system serving other divisions, be subject to restrictive covenants or offered for sale with other tracts which are part of those identified in Item 1 (above)? _____

Please specify _____

Book and page where covenants are recorded _____

4. Is the original tract of land part of a subdivision plat previously denied? _____

Occasional Sale Exemption
Page 2

5. Have you divided other property using exemptions? _____

If so, provide survey number or deed reference _____

6. What is the intended use of the property and to whom (if known) will the tract(s) be transferred?

7. For division using the occasional sale and remainder (to an occasional sale) exemptions identified in Item 1, to whom and when were these tracts transferred?

Exemption	COS #	To whom transferred	Date	Recording ref.
-----------	-------	---------------------	------	----------------

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent	Claimant
------------------	----------

License No., if applicable	Claimant
----------------------------	----------

Claimant

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me the undersigned Notary Public, personally appeared _____

(claimants)
known to me (or proved to me on oath) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

Notary Public
Residing in _____
Commission expires _____

EXHIBIT 4
DATE 3-12-93
HS 261

EXEMPTION AFFIDAVIT

for claiming exemptions
from the Montana Subdivision and Platting Act
Missoula County, Montana

RELOCATION OF COMMON BOUNDARY AND LOT AGGREGATION

Instructions: Please fill out the form completely and attach copies of documents as requested. Sign below before a notary public and submit this form, together with a sketch of the proposed division(s) or a preliminary certificate of survey or other document, to the County Attorney's Office.

Claimant's name, address and telephone

Agent's name, address and telephone (if agent used by claimant)

1. Proposed relocation of boundary between -----
----- (Certificate of Survey # or deed reference)

Other exemption proposed on the same survey -----

2. Reason for this boundary relocation or lot aggregation: -----

3. Name of party who will gain title to the portion of tract(s)
being transferred -----

4. What is the intended use of the property and to whom (if
known) will the tract(s) be transferred? -----

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent

Claimant

License No., if applicable

Claimant

Claimant

Relocation of Common Boundary and Lot Aggregation
Page Two

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me
the undersigned Notary Public, personally appeared _____

known to me (or proved to me on oath) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

Notary Public
Residing in _____
Commission expires _____

6/26/85

EXHIBIT 4
DATE 3-12-93
HB 261

EXEMPTION AFFIDAVIT

for claiming exemptions
from the Montana Subdivision and Platting Act
Missoula County, Montana

SECURITY INTEREST EXEMPTION

Instructions: Please fill out the form completely and attach copies of documents as requested. Sign below before a notary public and submit this form, together with a sketch of the proposed division(s) or a preliminary certificate of survey or other document, to the County Attorney's Office.

Claimant's name, address and telephone

Agent's name, address and telephone (if agent used by claimant)

1. Proposed division of -----
(Certificate of Survey # or deed reference)

Other exemption proposed on the same survey -----

2. Number of parcels created on this survey for security purposes

3. What is the intended use of the tract? -----

4. What is the purpose of the security being created? -----

5. Please attach a copy of the instrument for which security is being given (mortgage, lien, trust indenture) or a letter from the secured party or financial institution stating whether or not creation of the exempted parcel is necessary to secure a construction loan for building or other improvements on the parcel created.

Security Interest Exemption
Page Two

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent

Claimant

License No., if applicable

Claimant

Claimant

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me
the undersigned Notary Public, personally appeared _____

(claimants)
known to me (or proved to me on oath) to be the person(s) whose
name(s) is (are) subscribed to the within instrument, and
acknowledged to me that he (she or they) executed the same.

Notary Public

Residing in _____

Commission expires _____

EXHIBIT 4
DATE 2-13-93
X1 HB 261

EXEMPTION AFFIDAVIT
for claiming exemptions
from the Montana Subdivision and Platting Act
Missoula County, Montana

AGRICULTURAL EXEMPTION

Instructions: Please fill out the form completely and attach copies of documents as requested. Sign below before a notary public and submit this form, together with a sketch of the proposed division(s) or a preliminary certificate of survey or other document, to the County Attorney's Office.

Claimant's name, address and telephone

Agent's name, address and telephone (if agent used by claimant)

1. Proposed division of _____
(Certificate of Survey # or deed reference)

Other exemption proposed on the same survey _____

2. List all divisions of the tract existing as of July 1, 1974 of which your proposed division is a part and for each division provide the following information (attach additional sheets if needed):

a. Cert. of Survey # _____
or deed reference

b. Date survey filed _____

c. Name of person using _____
exemption

d. Exemption used _____

e. Is the tract contigu- _____
ous to the one pro-
posed to be divided?

Alternatively, attach copies of surveys creating exemptions and identify on the survey the relationship of the party filing the survey to the claimant.

3. Will the proposed tracts be served by a community sewer or water system, road system serving other divisions, be subject to restrictive covenants or offered for sale with other tracts which are part of those identified in Item 1 (above)? _____

Please specify _____

Book and page where covenants are recorded _____

4. Is the original tract of land part of a subdivision plat previously denied? _____

Agricultural Exemption
Page 2

5. Have you divided other property using exemptions? _____

If so, provide survey number or deed reference _____

6. What is the intended use of the property and to whom (if known) will the tract(s) be transferred?

7. Number of agricultural parcels being created on this survey

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all Montana state laws and Missoula City or County ordinances or resolutions.

Claimant's Agent

Claimant

License No., if applicable

Claimant

Claimant

State of Montana)
County of Missoula) ss

On this _____ day of _____, 19____, before me the undersigned Notary Public, personally appeared _____

(claimants)
known to me (or proved to me on oath) to be the person(s) whose name(s) is (are) subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

Notary Public

Residing in _____

Commission expires _____

6/26/85

ATTACH OR INCLUDE THE FOLLOWING MATERIALS WITH YOUR APPLICATION. ONLY COMPLETE THE SECTION WHICH APPLIES TO THE TYPE OF SYSTEM EXISTING OR PROPOSED. All of the appropriate material must be received by the Review Authority prior to final action upon any application. Please consult with the local health department or DHES regarding the proper submittal of this application and supporting material. If the property is located within a county either certified or contracted to perform the review of minor subdivisions, application must be made to the local health department. If the county is not certified or contracted to perform subdivision review, a copy of the application and supporting materials must be submitted to both the local health department and DHES.

I ON-SITE SEWAGE AND WATER SYSTEMS

1. Submit one copy of the Certificate of Survey or Plat of the Subdivision. All parcels less than 20 acres must be reviewed including "remainder parcels" left after a parcel is segregated from the original tract. If the application is for lifting "sanitary restrictions" from lot(s) in an existing subdivision, a copy of the plat and date of filing with the Clerk and Recorder should be included.
2. Submit a review fee of \$120.00 per lot. If the parcel being divided was previously reviewed by the Department of Health and Environmental Sciences, the fee applicable to the approved or existing site is \$30.
3. Submit a letter of approval from the County Health Officer or their designated representative (Sanitarian). Counties contracted to perform review services will utilize the Certificate of Plat Approval as their approval letter.
4. Submit three copies of a lot layout on a 8½"x11" sheet showing the location of proposed and/or existing sewage treatment systems, water supplies, and pertinent geographic features either within the lot boundaries or beyond, if applicable. The layout must either be drawn to scale or have critical distances labeled. Show the location of streams, ponds, swamps, intermittent stream drainageways, irrigation ditches, escarpments, bedrock outcroppings, and the 100 year floodplain if applicable. If the suitability of a lot is questionable, it may be necessary to show the location of the dwelling and driveway and permanently stake drainfield locations on the site.
5. Designate the location of the lot(s) on a 7 1/2 Minute or 15 Minute USGS topographic map or equivalent thereof.
6. Submit the closest available well log(s) no older than 5 years which demonstrates that an acceptable quantity of water is available. A minimum quantity of 8 gpm for 2 hours or 5 gpm for 4 hours is necessary for 1 dwelling and a minimum of 15 gpm for 2 hours is necessary for 2 dwellings. If well log(s) are not available from adjacent or representative wells in the area, or existing logs indicate the water supply is questionable, it may be necessary to drill a test well or submit a hydrogeological report. If an alternative water system such as a cistern, spring or surface water supply is proposed, provide documentation that well water is not available with sufficient quantity or quality. DHES should be contacted for requirements pertaining to alternative water supply systems.

MINOR SUBDIVISIONS
1 to 5 Lots or Parcels

This application form is to be used for minor subdivisions which replaces form ES 91 S. It may also be used for mobile home parks, recreational vehicle parks and condominiums or townhouses of 1 to 5 spaces or units.

PLEASE FILL OUT ACCURATELY AND COMPLETELY.

1. Name of submittal/subdivision _____
2. Name and address of record owner of land proposed for division or sanitary restriction removal:

(Name)

(Street/Box No.) (City) (State) (Zip Code) (Phone No.)

3. If someone other than the owner of record is to receive correspondence and the approval, please provide name and address of applicant's representative.

(Name)

(Street/Box No.) (City) (State) (Zip Code) (Phone No.)

4. Location of subdivision: _____ City _____ County _____

Legal description: ___ 1/4 ___ 1/4 of Section ___ Township ___ Range ___

5. Number of lots less than 20 acres (including remainder) _____.
Acreage of these lots _____.

6. Type of development proposed: Single-family residence _____. Commercial _____. Industrial _____. Multiple-family rental (no. of units _____. Condominium or Townhouse (no. of units _____.)

7. Type of sewage treatment system: Individual on-site septic system _____. Multiple-family on-site system _____. Service connection to multiple-family system _____. Service connection to public system _____. Extension of public main _____.

8. Type of water supply system: Individual well _____. Individual cistern _____. Individual surface water supply or spring _____. Multiple-family water supply system _____. Service connection to multiple-family system _____. Service connection to public system _____. Extension of public main _____.

9. Name of solid waste (garbage) disposal site _____

10. If this subdivision is not exempt from the Subdivision and Platting Act, have local planning or zoning officials been consulted? _____

Are Local Planning Board or Commissioner's comments included? _____

7. Submit a current, within 5 years, analysis of a water sample from a well within the proposed subdivision or a representative water sample within a one mile radius of the proposed subdivision. The sample must be analyzed for nitrates and conductivity (or total dissolved solids). Information regarding water quality obtained from hydrogeological reports may be used in lieu of a sample if a waiver is granted by the department. Additional testing for other parameters may be required where the department believes they may be present in harmful quantities.
8. Submit the results of a bacteriological analysis for every existing water supply system within the proposed subdivision. This is not applicable to proposed wells or springs.
9. Show the location of any test pits or percolation tests on the lot layout. An area to be set aside for replacement of any subsurface drainfield must be shown.
10. Submit results of a percolation test for each lot performed in accordance with DHES Circular WQB-6 in the area of the drainfield. Percolation tests are not required for existing sewage absorption systems if soils data is available. A copy of DHES Circular WQB-6 may be obtained from DHES or the local health department.
11. Submit a description of soil profile from a pit excavated to a depth of 7-10 feet. A six foot depth from the natural ground surface to seasonal high groundwater or bedrock is required for conventional drainfields. Whenever adequate depth to groundwater or bedrock is questionable, a test hole will be required. Soils information is necessary for both existing and proposed systems.
12. Indicate the estimated or measured depth to seasonal high groundwater table. Indicate the date the test hole was observed. Explain how this determination was made and why it is thought to be representative of the seasonal high level. Actual water level monitoring of a test hole will be required for all sites thought to be marginal. Indicate whether any area within the vicinity of the proposed drainfield is subject to flood irrigation. This information is necessary for both existing and proposed systems. A copy of "Groundwater Monitoring Policy" may be obtained from DHES or the local health department.
13. Indicate the percent of slope across the drainfield and replacement areas. A slope of 15% or less is necessary except that a special report must be provided for slopes of 16% to 25%. Drainfields are to be installed without land leveling or modification of the natural slope. A 25 foot horizontal separation must be maintained between the drainfield and any downslope grade exceeding 25%. A copy of the "16% to 25% Slope Policy" may be obtained from DHES or the local health dept.
14. Indicate the location of any stormwater drainage structures that will affect the proposed land division. Show existing or proposed culverts and their diameter, sumps, drainage ditches and natural swales.
15. Submit a copy of the signed written easement for any water or sewer system located in such a manner that perpetual access is necessary. Easements may be designated and described by the survey if acknowledged by the affected property owner.

Your application must also indicate that the following minimum requirements will be met:

1. Minimum one acre lot size if served by both individual water and sewage systems. If either water or sewer services are provided by an approved public or multiple-family system, lot size may be reduced to 20,000 square feet. There is no minimum lot size if both water and sewer service are provided by a public or multiple-family system.
2. Minimum separation distance of 100 feet horizontally between a drainfield or replacement drainfield and any well, stream, pond or irrigation ditch. Minimum separation distance of 50 feet horizontally between a drainfield or replacement drainfield and any cistern. This requirement is applicable to systems located on adjacent lots.
3. Minimum separation distance of 50 feet horizontally between a septic tank and any well, cistern, stream, pond or irrigation ditch. This requirement is applicable to systems located on adjacent lots.
4. Minimum separation distance of 10 feet horizontally between a drainfield or replacement drainfield and any property line.
5. Approval by the local planner, planning staff and County Commissioners if the plat is subject to review under the Subdivision and Platting Act.
6. Proposed wells must be completed to a minimum depth of 25 feet and grouted in accordance with Board of Water Well Contractors Rules.
7. Minimum separation distance of 10 feet horizontally between drainfields or septic tanks and water lines.

II SUPPLEMENTAL INFORMATION FOR LOTS WITH EXISTING DWELLINGS

If the above-listed information is not available or minimum standards are not met, provide the following supplemental information:

1. Date of construction of the sewage system _____
2. Date of construction of the water system _____
3. Flow of well in gpm _____. This may be measured after a two hour period of flow or verified by a notarized affidavit.
4. Size of septic tank, _____ gallons. Lineal footage of drainfield installed, _____ feet. These items may be determined by uncovering portions of the system or verified by a notarized affidavit.

If existing water supply or sewage disposal systems do not meet current standards, they must meet the standards in effect at the time of their installation. Systems installed prior to the development of standards must be shown to operate without risk to public health and without pollution of state waters.

III MULTIPLE-FAMILY WATER AND SEWAGE SYSTEMS

(3 through 9 living units)

Applicants should request a copy of Circular WQB-4 for sewage systems and/or WQB-3 for water supply systems. It is necessary to supply the additional information required by these circulars for review purposes. You may want to contract the services of a local consultant to prepare multiple-family applications due to the more complex nature of system design.

IV SERVICE CONNECTIONS TO MULTIPLE-FAMILY OR PUBLIC/MUNICIPAL SYSTEMS

A service line is defined as a water or sewer line that connects a single building or living unit to a public system or extension of such a system. A service line shall not be used to provide water or sewer service in public roadways, alleys or easements where main extensions should be utilized. Provide the following information:

1. Show the location of the existing water and/or sewer mains and indicate the diameter of these lines. Show the location of the proposed service lines. If service lines cross private property under separate ownership, easements will be necessary.
2. Provide written approval from the city, town, or controlling entity permitting connection to the existing system. This is not required for dwellings already connected to public water or sewer.
3. Provide evidence that the existing lines have received approval under Public Water Supply Laws. Indicate the SID number, project number or other identifying information.
4. Review fee of \$30 per lot if both water and sewer are service connections, \$55 per lot if either are extensions, \$75 per lot if either is an individual system and the other public/municipal, or \$120 per lot if either is a multiple-family system and the other an individual system.

V EXTENSIONS TO PUBLIC/MUNICIPAL WATER AND/OR SEWER SYSTEMS

An extension line is defined as a water or sewer line that connects two or more service lines to a main line.

1. Provide written approval from the city, town, or controlling entity permitting connection to the existing system.
2. Provide plans and specifications prepared by an engineer in accordance with Recommended Standards for Water Works and/or Recommended Standards for Sewage Works.
3. Provide an engineer's design report which demonstrates the existing systems have adequate capacity to serve the new lots.
4. A notarized letter stating that a registered professional engineer will be employed to inspect and certify that construction is in accordance with DHES approved plans and specifications. Indicate the name of the engineer.
5. Review of \$80 per lot if both water and sewer are extended and \$55 per lot if only one utility is extended.

This is to certify that I have provided the data and information requested in this form and that it is accurate and complete to the best of my knowledge and belief:

(Signature of person completing this form)

(Date)

(Professional affiliation)

If someone other than the record owner is preparing this application, the signature of that person is required above.

It is hereby agreed that if the attached plans are approved by the Department of Health and Environmental Sciences, installation of water and sewer facilities will be made in accordance with such approved plans. If the subdivided lands are sold before such installations are made, it is agreed that all purchasers of lots will be furnished with legible copies of the approved plans, and they will be notified of the necessity of making installations in accordance with such approved plans. Deviations from approved plans must be approved by the local and state health department prior to construction.

(Print name of OWNER of record)

(Date)

(Signature of OWNER of record)

(Street/Box No.)

(City)

(State)

(Zip)

(Phone No.)

(Official title, if corporate owner)

This statement must be signed BY THE OWNER of the land proposed for subdivision or the responsible official of the corporation offering the same for sale.

APPENDIX J

CRITERIA FOR REVIEW OF CLAIMED EXEMPTIONS FROM
PROVISIONS OF SUBDIVISION AND PLATTING ACTSTATEMENT OF INTENT

The intent and purpose of this document is to provide administrative procedures for implementing Sections 76-3-201 and 207, MCA, of the Montana Subdivision and Platting Act. These procedures are designed to provide persons administering the Act criteria for evaluating the purpose of claimed exemptions, and further, to provide persons claiming an exemption opportunities for demonstrating their eligibility for such claims. The criteria set forth herein, are to be used as guidelines for evaluation of such eligibility and are not in themselves conclusive. Further, said criteria do not presume that prior uses of exemptions were unlawful.

SECTION A. APPLICATION AND INITIAL REVIEW

1. Any person (which term includes an individual, firm, association, partnership, corporation, and public agency) seeking exemption from the subdivision review requirements of the Montana Subdivision and Platting Act, Section 76-3-101 et seq., MCA (the Act), and/or the Lewis and Clark County Subdivision Regulations (the Regulations), shall apply for the exemption by furnishing evidence of entitlement to the claimed exemption to the Clerk and Recorder. Such evidence may include, but is not limited to, a certificate of survey, a completed and signed "certificate of survey exemption affidavit," and documentation of ownership.

2. A Review Committee (Committee), appointed by the Board of County Commissioners (Board) and consisting of the Clerk and Recorder, Planning Director, and County Attorney (or their designees), shall review evidence submitted by the applicant on the basis of the criteria set forth in these regulations. Within ten (10) working days after submission of the documents, the Committee shall make written findings and shall notify the applicant in writing of the Committee's determination.

3. If the Committee determines that the applicant is eligible for the claimed exemption under these criteria and if the certificate of survey complies with all other applicable statutes and regulations, the certificate of survey may be filed.

4. If the Committee determines that the applicant is not eligible for the claimed exemption, it shall notify the applicant of the reasons for the denial. The applicant shall have ten (10) days from the date of denial to provide the Committee any further evidence to prove the applicant is eligible for the exemption. The Committee shall have ten (10) working days to review any new evidence. The applicant may also within ten (10) days from the date of denial, withdraw the application or submit in writing to the Board a request that a hearing be held.

5. If the Committee reaffirms that the applicant is not eligible for an exemption, it shall notify the Board and the applicant in writing of the Committee's reasons for its determination. Thereafter, the applicant may withdraw the application or, within ten (10) days, submit in writing to the Board, a request that a hearing be held.

SECTION B. HEARING PROCEDURE

1. Upon receipt of a written request for a hearing, the Board shall set a time and place for the hearing. At least five (5) days prior to the date set for the hearing the Board shall send notice of the hearing to the applicant by certified mail.

2. At the hearing, the applicant has the burden of proof by a preponderance of the evidence and shall first present evidence. The Committee shall then present its evidence. The applicant may then present rebuttal evidence. The hearing shall then be closed.

3. The Board shall approve or disapprove the proposed exemption within fifteen (15) days of the receipt of the request for hearing. The Board shall provide written notification of its decision and the reasons therefor, to the applicant and the Clerk and Recorder.

SECTION C. GENERAL REQUIREMENTS

1. The use of any exemption set forth in Sections 76-3-201 and 76-3-207, MCA, for the purposes of evading subdivision review under the Act or the Regulations is prohibited.

2. For the purposes of interpreting this document, the following definitions shall be used:

(a) TRACT: A single parcel of land held in single and undivided ownership as shown by the official records on file in the office of the county clerk and recorder.

(b) ORIGINAL TRACT: A tract of land created as of July 1, 1973.

3. In determining whether an exemption is claimed to evade subdivision review the Committee, and when necessary, the Board, shall consider the specific exemption criteria and presumptions set forth in these criteria and may also consider other evidence including but not limited to:

(a) The prior history of the tract;

(b) The proposed configuration of the particular tract to adjacent tracts, if the proposed exemptions were to be granted; and,

(c) The pattern, if any, of exemptions used by the applicant and/or the applicant's immediate family, and/or other persons having any

business, economic, ownership or other relationship with the applicant that has or will result in the creation of a subdivision without review by the Board.

4. A certificate of survey for which an exemption is claimed may not be filed by the Clerk and Recorder unless it bears a certificate acknowledged by all owners of record stating that the division is exempted from review as a subdivision and quoting the applicable exemption and citing the appropriate MCA section. A certificate of survey claiming an exemption other than a gift or sale to a member of the immediate family may divide a parcel once only. Only one type of exemption may be claimed on any certificate of survey.

SECTION D. EXEMPTION CRITERIA

1. RELOCATION OF COMMON BOUNDARY LINES [Section 76-3-207(1)(a)]:

- a. The relocation of common boundary lines exemption is used to change the location of a boundary line between two parcels of record.
- b. Certificates of survey showing the boundaries and areas of land, shall be accompanied by a deed transferring interest in the parcel being created, or a contract for deed or a notice of purchaser's interest. If no such document can be recorded prior to the filing of the certificate of survey, the applicant must submit an acknowledged statement from an escrow agent setting forth the location of the deed or contract being held in escrow and how long it will be held in escrow and a photocopy of the document.
- c. There is a rebuttable presumption that any boundary relocation is or will be an inappropriate use of the exemption, under the Act or the Regulations, thereby making the proposed division and transfer subject to subdivision review, if:
 - (1) It creates a parcel of less than 20 acres which, prior to the relocation, had more than 20 acres; or
 - (2) It creates any additional parcel of land less than 20 acres in size; or
 - (3) The proposed use of the exemption, or proposed division of land, fits a previously established pattern of land divisions and land transfers which evidence an inappropriate use of an exemption under the Act or the Regulations; or
 - (4) The arrangement of the claimed exemption, and/or previous land division(s) evidence an inappropriate use of the exemption under the Act or the Regulations; or
 - (5) The proposed use of the exemption, by location or configuration, will create three or more parcels that were subdivided from the original tract; or

- (6) The applicant has engaged in similar prior transfers with the original tract or other tracts.

2. EXEMPTION AS A GIFT OR SALE TO A MEMBER OF THE IMMEDIATE FAMILY
[Section 76-3-207(1)(b)]:

- a. A "member of the immediate family" may include only the grantor's spouse, or the grantor's son, daughter, mother, and father, whether by blood or adoption.
- b. Certificates of survey, showing the creation of new parcels of land pursuant to an exemption for a gift or sale to a member of the grantor's immediate family must be accompanied by one of the following documents to be recorded in conjunction with the filing of the certificate of survey: a deed transferring an interest in the parcel being created, or a contract for deed or a notice of purchaser's interest. If no such document can be recorded prior to the filing of the certificate of survey, the applicant must submit an acknowledged statement from an escrow agent setting forth the location of the deed or contract being held in escrow and how long it will be held in escrow and a photocopy of the document.
- c. There is a rebuttable presumption that a division of land and a transfer, proposed as an exempt "gift or sale to family member," is or will be an inappropriate use of the exemption under the Act and the Regulations, thereby making the proposed division and transfer subject to subdivision review, if:
 - (1) The original or any subsequent tract, from which the parcel created for transfer is to be segregated, was exempted from subdivision review as:
 - (a) Security for a construction mortgage, lien or trust indenture under Section 76-3-207(2), MCA;
 - (b) A gift or sale to a member of the immediate family under Section 76-3-207(1)(b), MCA;
 - (c) An occasional sale under Section 76-3-207(1)(d), MCA; or
 - (2) The parcel to be transferred is not intended for a homesite for the transferee; or
 - (3) The transfer could be accomplished by a "relocation of common boundary lines" under Section 76-3-207(1)(a), MCA; or
 - (4) The proposed transfer, by its location or configuration, becomes or will become one of three or more parcels that were subdivided from the original tract; or
 - (5) The use of the exemption is in violation of statutes, case law, administrative rules, or Attorney General opinions; or

- (6) The proposed division of land fits a pattern of land divisions and land transfers; or
 - (7) The applicant has engaged in similar prior transfers with the original tract or other tracts; or
 - (8) The applicant proposes to use this exemption a second or subsequent time to transfer a parcel of land to the same family member and the first parcel created by a family exemption has been conveyed or further divided by exemptions; or
 - (9) The parent purports to act as a guardian for a minor child without a trust instrument.
- d. When a second or subsequent transfer to the same member of the immediate family is proposed using this exemption the applicant shall submit, in addition to such other documents as may be required, a written statement setting forth:
- (1) The reason for subsequent conveyance;
 - (2) The filing dates of all exempt transfers previously made;
 - (3) The name and relationship of the family member to whom any prior transfer was made; and,
 - (4) The disposition, if any, made of each previously transferred parcel exempted from subdivision review.

3. AGRICULTURAL EXEMPTION [Section 76-3-207(1)(c)]:

- a. An agricultural exemption is a division of land made outside of a platted subdivision by sale or agreement to buy and sell where the parties to the transaction and the governing body enter a covenant running with the land, revocable only by mutual consent of the governing body and the property owners, that the divided land will be used exclusively for agricultural purposes.

- b. Creation, Revocation, and Retention of the Agricultural Exemption:

Creation of parcels by use of the agricultural exemption, and the subsequent revocation or retention of the agricultural covenant, shall be subject to the provisions of Resolution 1986-55, entitled "Resolution of the Board of County Commissioners Setting Forth a Policy Relating to Divisions of Land for Agricultural Purposes, Exempt From Review under the Montana Subdivision and Platting Act."

4. EXEMPTION AS AN OCCASIONAL SALE [Section 76-3-207(1)(d)]:

- a. An occasional sale is a single division of an existing tract of land into two parcels for the purpose of selling either parcel. No subsequent division of either parcel by use of this exemption may occur until an interest in either parcel is transferred, the transfer

is recorded with the Clerk and Recorder, and 365 days have passed subsequent to the date the transfer became of record.

- b. There is a rebuttable presumption that a division of land proposed as an exempt occasional sale is or will be an inappropriate use of the exemption under the Act and the Regulations, thereby making the transfer subject to subdivision review, if:

- (1) The original or any subsequent tract, from which the parcel created for transfer is to be segregated was exempted from subdivision review as:

a) Security for a construction mortgage, lien or trust indenture under Section 76-3-207(2), MCA;

b) A gift or sale to member of the immediate family under Section 76-3-207(1)(b), MCA;

c) An occasional sale under Section 76-3-207(1)(d), MCA; or

- (2) The transfer could be accomplished by a "relocation of common boundary lines" under Section 76-3-207(1)(a), MCA; or

- (3) The proposed transfer, by its location or configuration, becomes or creates three or more parcels that were subdivided from the original tract; or

- (4) The use of the exemption is in violation of statutes, case law, administrative rules, or Attorney General opinions; or

- (5) The proposed division of land fits a pattern of land divisions and land transfers; or

- (6) The applicant has engaged in similar prior transfers with the original tract or other tracts; or

- (7) The proposed division of land creates a "subdivision" (one or more parcels to be conveyed) which is not a "single division" of one parcel exempt from review under Section 76-3-207(1)(d), MCA; or

- (8) An applicant has transferred an interest in property created by a prior use of this exemption, and less than 365 days have passed subsequent to the date said transfer became of record.

5. EXEMPTION TO PROVIDE SECURITY FOR CONSTRUCTION MORTGAGES, LIENS, OR TRUST INDENTURES [Section 76-3-201(2)]:

- a. The construction mortgage exemption is used to segregate land for the purpose of providing security for construction mortgages, liens, or trust indentures. It only operates as a division of land upon foreclosure of the security.

4
DATE 3-12-93
HB 261

- b. A certificate of survey claiming this exemption shall bear the acknowledged certificate of the landowner stating that:
- (1) The exemption is not being claimed in order to evade subdivision review under the Act or the Regulations; and
 - (2) The creation of the exempt parcel is necessary to secure a construction mortgage loan or to otherwise finance construction for building or other improvements.
- c. The certificate of survey must be accompanied by a letter from the holder of the mortgage, lien, or trust indenture, stating that a construction loan has been approved, will be granted upon the filing of the certificate of survey and naming the person to whom the loan will be made.
- d. There is a rebuttable presumption that a proposed use of this exemption, or a division of land by use of this exemption, is subject to subdivision review, if:
- (1) The instruments offered to the Clerk and Recorder do not conform to the requirements set forth in Sections D-5-b and D-5-c of this document; or
 - (2) The proposed division of land fits a pattern of land divisions and land transfers; or
 - (3) The proposed transfer, by its location or configuration becomes or creates three or more parcels that were subdivided from the original tract; or
 - (4) The applicant has engaged in similar prior transfers with the original tract or other tracts.

SECTION E. TERMINATION

Appendix J is effective upon passage and terminates on June 30, 1989, unless re-established prior to that date.

Lewis & Clark Co.

CERTIFICATE OF SURVEY REPORT
(please attach to survey for review and filing)

DATE SUBMITTED _____ DATE REVIEWED (office use) _____

PURPOSE OF SURVEY _____

NAME OF APPLICANT _____

Address _____ Phone _____

NAMES OF OWNERS _____

NAME OF SURVEYOR _____

Address _____ Phone _____

SECTION _____ TOWNSHIP _____ RANGE _____ or SUBDIVISION _____

THE FOLLOWING IS TO BE FILLED OUT BY THE SURVEY REVIEW COMMITTEE

CERTIFICATE REQUIREMENTS

The following items must be included on the certificate of survey:

1. Name(s) of Owner(s)
2. Title Block
3. Names of adjoining subdivisions, landowners, and/or numbers of adjoining certificates of survey
4. Legal description of the perimeter boundary of the tract surveyed, and any remaining parcels less than 20 acres
5. All parcels (existing and proposed) labeled by number or letter
6. Acknowledged certificate of owner(s) stating that proposed division is exempt from review as a subdivision, and the citation of the applicable exemption
7. Signed and acknowledged covenant to be recorded (Agricultural)
8. Name(s) of grantee(s) and relationship to Owner for each specific parcel (Gift to Family Member)
9. Signatures of all affected landowners (Boundary Relocation)
10. Documentation [survey number(s), and/or book and page numbers] substantiating the existence of parcel (Retracement)
11. Certification of County Treasurer [76-3-207(3), MCA]
12. Citation of DHES exemption stated in entirety under 16.16.605(2), ARM
13. Citation of DHES exemption under 16.16.605(1), ARM [76-3-201; 76-3-204; 76-3-207(1)(c), MCA]
14. DHES approval letter under 16.16.105(1), ARM [76-3-207(1)(a), (b), (d); 76-3-208; 76-3-210(1), MCA]
15. C-CEHD approval for parcels reduced in size through Boundary Relocation
16. Signature and seal of registered land surveyor
17. Other survey requirements _____

EXHIBIT 4
DATE 3-12-93
H3 261

OTHER REQUIREMENTS

- | | | |
|--|----|---|
| <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA | 1. | Is the property within a platted subdivision? |
| <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA | 2. | Is the property within a zoned area? |
| <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA | 3. | Does the proposed division conform with zoning regulations? |
| <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA | 4. | Is the Certificate of Survey Exemption Affidavit complete? |

COMMENTS

County Attorney _____ County Planning _____ Clerk and Recorder _____

C-CEHD Approval _____

EXEMPTION REVIEW

The Review Committee has determined that the proposed land division is an:

- ☐ Appropriate use of the claimed exemption
- ☐ Inappropriate use of the claimed exemption (based upon the specific sections of Appendix J of the County Subdivision Regulations identified on the attachments to this form)

If you disagree with the findings of the Review Committee, you may submit further information to the Committee (pursuant to Section A-4 of Appendix J) or request a hearing on the proposed land division before the Board of County Commissioners (pursuant to Sections A-5 and B). Please be aware of the timeframes outlined in these procedures, as stated on the attachments to this form.

Alternatively, you may wish to discuss the procedures and requirements for review as a minor subdivision under the County Subdivision Regulations. If you wish to pursue this alternative, please contact the County Planning Department at 447-8374.

Kim Harris, Clerk and Recorder/Treasurer

SURVEYOR'S REPORT

Examining Land Surveyor

EXHIBIT 4
DATE 3-12-93
XL HB 261

CERTIFICATE OF SURVEY EXEMPTION AFFIDAVIT
LEWIS AND CLARK COUNTY, MONTANA
Relocation of Common Boundary Lines; Section 76-3-207(1)(a), MCA

Information provided on this form is necessary in determining when the use of an exemption meets the criteria set forth in the Lewis and Clark County Subdivision Regulations, Appendix J.

The relocation of common boundary lines exemption is used to change the location of a boundary line between two parcels of record.

I. APPLICANT(S) _____

II. State reason(s) showing the need for relocation of boundaries.

A. Surveyor Error _____ B. Encroachment _____
C. Other _____ Explain _____

____ YES ____ NO III. Have any exemptions been used for prior divisions of land on the original tract since July 1, 1973? If "yes", please list:

Date	Exemption	Tract Label	Tract Size	COS No.
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

____ YES ____ NO IV. Was the original tract of land ever denied approval as a subdivision?

Certificates of survey showing the boundaries and areas of land, shall be accompanied by a deed transferring interest in the parcel being created, or a contract for deed or a notice of purchaser's interest. If no such document can be recorded prior to the filing of the certificate of survey, the applicant must submit an acknowledged statement from an escrow agent setting forth the location of the deed or contract being held in escrow and how long it will be held in escrow and a photocopy of the document.

____ YES ____ NO V. Is the submittal accompanied by a quit claim deed from all the adjoining property owners for the entire newly described parcel(s)?

There is a rebuttable presumption that any boundary relocation is or will be an inappropriate use of the exemption, under the Act or the Regulations, thereby making the proposed division and transfer subject to subdivision review, if the proposed division meets any of the following criteria:

- ____ YES ____ NO 1. Does it create a parcel of less than 20 acres which, prior to the relocation, had more than 20 acres?
- ____ YES ____ NO 2. Does it create any additional parcel of land less than 20 acres in size?
- ____ YES ____ NO 3. Does the proposed use of the exemption, or proposed division of land, fit a previously established pattern

of land divisions and land transfers which evidence an inappropriate use of an exemption under the Act or the Regulations?

- ____ YES ____ NO 4. Does the arrangement of the claimed exemption, and/or previous land division(s) evidence an inappropriate use of the exemption under the Act or the Regulations?
- ____ YES ____ NO 5. Does the proposed use of the exemption, by location or configuration, create three or more parcels that were subdivided from the original tract?
- ____ YES ____ NO 6. Has the applicant used exemptions to create parcels from the original tract or other tracts?

Under penalties of perjury, I (we) declare that I (we) have examined this form including the accompanying Certificate of Survey, and to the best of my (our) knowledge and belief, it is true, correct, complete and is in compliance with all State laws and local regulations.

Date _____

Signature of
Each Applicant

STATE OF MONTANA)
) ss.
County of _____)

On this _____ day of _____, 19____, before me a Notary Public for the State of Montana, personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same.

Notary Public for the State of Montana

(Notary's Seal)

Residing at _____, Montana

My Commission Expires _____

Signature of Surveyor

License No. _____

The regulation of the number and location of wells over an oil or gas reservoir, as a conservation measure.

It is generally agreed today that increased recovery from a reservoir is not a function of the number of wells drilled. Thus to the extent that more wells are drilled than are necessary for maximum recovery, there is economic waste, since the cost of drilling the unnecessary wells need not have been incurred. It has been estimated by Mr. R.E. Hardwick that over \$100 million was spent annually in Texas in the period 1947-1952 for drilling, equipping and operating unnecessary wells. See 31 *Texas L. Rev.* 99 at 111 (1952).

In addition to curbing such waste, well spacing also prevents injury to the reservoir. Excessive rates of withdrawal from a reservoir, particularly where the rate in one section of the field is disproportionate to that in another, can result in physical waste from irregular or premature water or gas encroachment. Well spacing, based on a uniform pattern (such as one well to 40 acres), will inhibit such physical waste by making unnecessary disproportionate withdrawals. See American Petroleum Institute, *Standards of Allocation of Oil Production* 27-30 (1942); Hardwick, *supra*, 31 *Tex. L. Rev.* 99 (1952).

Well spacing is normally accomplished by order of the regulatory conservation commission. The order may be statewide in its application (subject to change for local conditions) or it may be entered for each field after its discovery. Some well spacing orders divide up the field into spacing units, using the grid system of the U.S. General Land Office Survey. Thus an order might prohibit the drilling of more than one well in each quarter, quarter section. Another system is to prohibit the drilling of a well closer than x feet from another well or closer than y feet to any surface boundary line. This is the method used in the Texas spacing rule, Rule 37 (q.v.).

The problem then arises of what to do with tracts of land smaller than those upon which drilling is permitted under the order. In general, two solutions have been adopted. The first is to permit drilling on such undersized tracts as an exception to the rule. This solution seriously impairs the value of well spacing, for it allows the evils to arise that uniform spacing would prevent. But it removes the spacing rule from the jeopardy of unconstitutionality, since with the granting of exceptions the rule does not deprive the land owner of the opportunity to produce the oil beneath his undersized tract. This is the well-spacing system in Texas [see Rule 37].

However, uniform spacing can be achieved without allowing exceptions and without depriving the landowner of a chance to recover his oil. This is accomplished by COMPULSORY POOLING (q.v.), whereby the regulatory agency combines small tracts into sufficient area to meet the standard of the well spacing order. To take a single example, if the spacing order calls for 40-acre drilling units, the owners of two twenty acre tracts would be required to combine their land to form one drilling unit. Usually, the landowners share proportionately the benefit of surface acreage but certain forms may

used, such as acre feet of producing sand. The constitutionality of compulsory pooling statutes has been uniformly upheld. See *TREASURY CH. 9*.

The development of well spacing and compulsory pooling in Oklahoma is discussed in Dancy and Dancy, "Regulation of the Oil and Gas Industry by the Oklahoma Corporation Commission," 21 *Tulsa L.J.* 613 (1986).

The development of well spacing legislation in the United States and Canada is traced in Harrison, "Regulation of Well Spacing in Oil and Gas Production," 8 *Alberta L. Rev.* 357 (1970).

Under appropriate circumstances, a regulatory commission may de-space existing drilling units and create new drilling units of a different size. See *El Paso Natural Gas Co. v. Corporation Commission*, 640 P.2d 1336, 72 *O.&G.R.* 93 (Okla. 1982) (finding that sufficient evidence was presented to the Commission to hold a substantial change of knowledge of conditions existed which authorized a change in spacing from 1,440 acres to 640 acres. One of the several factors considered by the Commission was the economic circumstances of a dramatic increase in gas prices in the period since the spacing was originally ordered).

Kuykendall v. Corporation Comm'n, 634 P.2d 711, 71 *O.&G.R.* 364 (Okla. 1981), sustained a Commission order establishing 1,440-acre drilling and spacing units, concluding that it was permissible for the Commission to consider general economic conditions such as an increase in the price of gas which effect financial inducements to drill and develop a common source of supply as included within the Kalcdoscope of "waste."

Anderson, "Compulsory Pooling in North Dakota: Should Production Income and Expenses Be Divided from Date of Pooling, Spacing, or 'First Run'?" 58 *No. Dak. L. Rev.* 537 at 573 (1982), argues that "a well spacing order should be retroactive to the date of first production and a compulsory pooling order should be retroactive to the effective date of spacing."

For a case giving retroactive operation to a compulsory pooling order, see *Murphy v. Amerco Production Co.*, 590 F.Supp. 455, 83 *O.&G.R.* 108 (D.

See also *Dowd*
SPACING UNIT, S.
AREA.

MONTANA PETROLEUM ASSOCIATION
A Division of the
Rocky Mountain Oil and Gas Association
Janette K. Fallan
Executive Director

Well stimulation

See STIMULATE

OUR NEW ADDRESS

33 So. Last Chance Gulch, #2B
P.O. Box 1186, Helena, MT 59624

Telephone: 406/442-7582



EXHIBIT 5
DATE 3-12-93
IB 261

EXHIBIT 6
DATE 3-12-93
HB 171

CLERK OF DISTRICT COURT

SEP 23 8 05 AM '92

FILED CINDY EVENSON

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

*****)
)
MONTANA ENVIRONMENTAL INFORMATION)
)
CENTER, a Montana non-profit)
)
corporation, and THE MONTANA)
)
FREEDOM OF INFORMATION HOTLINE,)
)
INC., a Montana non-profit)
)
corporation,)
)
Plaintiffs,)
)
vs.)
)
MONTANA DEPARTMENT OF STATE LANDS,)
)
a Department of the State of)
)
Montana,)
)
Defendant,)
)
and)
)
THE MONTANA MINING ASSOCIATION,)
)
Intervenor-Defendant.)
)
*****)

Cause No. CDV-92-020

MEMORANDUM AND ORDER

The issue before the Court is whether Section 82-4-306, MCA, is unconstitutional because it violates Article II,

1 Section 9, of the Montana Constitution. The issue has been
2 fully briefed and is ready for decision.

3 BACKGROUND

4 On November 25, 1991, James Jensen, executive director
5 of the Montana Environmental Information Center (MEIC), wrote
6 Sandy Olsen, chief of the Hard Rock Bureau of the Montana
7 Department of State Lands (DSL), requesting information about
8 four exploration licenses issued by DSL for mining exploration
9 on private land. In his letter Jensen stated that he was
10 especially interested in any restrictions or requirements,
11 including performance bonds, which might have been placed on the
12 licensees relating to hazardous materials management, air and
13 water quality protection and reclamation. He also requested a
14 copy of the environmental assessment DSL had prepared on the
15 exploration permit for the Montanore project, a large explora-
16 tion tunnelling project adjacent to and beneath the Cabinet
17 Mountains Wilderness Area.

18 Relying on the provisions of Section 82-4-306, MCA,
19 Olsen wrote Jensen on November 26, 1991, stating that she could
20 not approve his request to look at specific exploration files
21 concerning private lands. Also on November 26, 1991, Jensen
22 received a press release from Noranda Minerals Corp., owner of
23 the Montanore project, stating that Noranda was interrupting its
24 exploration tunnelling activities at the Montanore project in
25

1 response to an "advisory issued by the Montana Department of
2 State Lands requiring that Noranda Minerals initiate immediate
3 action to reduce nitrate levels in the water of Libby Creek."

4 Plaintiffs filed this action on January 6, 1992. On
5 January 9, 1992, Noranda Minerals' project director for the
6 Montanore project wrote DSL and gave DSL a partial waiver of
7 confidentiality as to the Montanore project. The letter stated
8 that the file does not contain proprietary geological
9 information.

10 DISCUSSION

11 Section 82-4-331(1), MCA, provides that no one may
12 engage in exploration without first obtaining an exploration
13 license from DSL. Under Section 82-4-332, MCA, an application
14 must "include an exploration map or sketch in sufficient detail
15 to locate the area to be explored and to determine whether
16 significant environmental problems would be encountered." The
17 applicant must also submit a plan of operation which provides a
18 detailed description of the proposed exploration activities; a
19 description of the environment potentially affected by the
20 exploration activities; and a reclamation plan.

21 After DSL determines that an application is complete,
22 it evaluates the information submitted; does a site inspection;
23 and prepares an environmental assessment. As part of its
24 review, DSL determines whether conditions should be placed on a
25

1 license. Also, a reclamation bond needs to be posted prior to
2 issuance of any exploration license. After a license has been
3 issued, DSL monitors the licensee to insure compliance with the
4 license requirements and state laws. As part of the monitoring
5 process, the licensee may be required to submit periodic reports
6 to DSL. If it appears that a licensee is not in compliance with
7 its license, DSL may issue a notice of non-compliance and order
8 the licensee to take corrective action. DSL's file on a partic-
9 ular license may contain correspondence, notes from telephone
10 calls and meetings and citizens' complaints.

11 Section 82-4-306, MCA, provides:

12 Confidentiality of application
13 information. (1) Except as provided in
14 subsections (2) and (3), any information
15 obtained by the board or by the director or
16 his staff by virtue of applications for
17 exploration licenses and all information
18 obtained from small miners is confidential
19 between the board and the applicant, except
as to the name of the applicant and the
20 county of proposed operation; provided that
21 all activities conducted subsequent to ex-
22 ploration and other associated facilities
23 shall be public information and conducted
24 under an operating permit.

25 (2) Any information referenced in sub-
section (1) is properly admissible in any
hearing conducted by the director, the
board, appeals board, or in any judicial
proceeding to which the director and the
applicant are parties and is not confiden-
tial when a violation of this part or rules
adopted under this part has been determined
by the department or by judicial order.

(3) The department may disclose

1 information obtained by the board, the
2 commissioner, or department staff from
3 exploration license applications and from
4 small miners for exploration or mining on
5 state and federal lands that identifies the
6 location of exploration and mining
7 activities and that describes the surface
8 disturbance that is occurring or projected
9 to occur. The department may not disclose a
10 licensee's or small miner's proprietary
11 geological information.

12 (4) Failure to comply with the secrecy
13 provisions of this part is punishable by a
14 fine of up to \$1,000. (Emphasis supplied.)

15 Plaintiffs contend that this statute, which requires
16 DSL to keep confidential all information obtained by it from
17 applicants for exploratory licenses or from small miners,
18 irreconcilably conflicts with Article II, Section 9, of the
19 Montana Constitution which provides:

20 Right to know. No person shall be
21 deprived of the right to examine documents
22 or to observe the deliberations of all
23 public bodies or agencies of state govern-
24 ment and its subdivisions, except in cases
25 in which the demand of individual privacy
clearly exceeds the merits of public
disclosure.

The Montana Supreme Court has developed a two-part
balancing test to determine whether a person has a constitu-
tionally protected privacy interest. Montana Human Rights Div.
v. City of Billings, 199 Mont. 434, 442, 649 P.2d 1283, 1287
(1982). First, there must be a determination as to whether a
person has a subjective or actual expectation of privacy. The
second part of the test is a determination of whether society

1 would recognize that expectation as reasonable. In applying the
2 test to the Montana Open Meeting Act, the court stated:

3 However, the right to know is not
4 absolute. The more specific closure stan-
5 dard of the constitutional and statutory
6 provisions requires this Court to balance
7 the competing constitutional interests in
8 the context of the facts of each case, to
9 determine whether the demands of individual
10 privacy clearly exceed the merits of public
11 disclosure. Under this standard, the right
12 to know *may* outweigh the right of individual
13 privacy, depending on the facts.

14 Before balancing these interests,
15 however, it must be determined more
16 precisely what interests are at stake. This
17 determination includes consideration of
18 various facets of the public interest and is
19 required by the language of the right to
20 know provision, which calls for a balancing
21 of the "demands of individual privacy" and
22 the "merits of disclosure."

23 Missouliau v. Board of Regents, 207 Mont. 513, 529, 675 P.2d
24 962, 971 (1984).

25 Here, the interest at stake is proprietary geological
information. In Mountain States Tel. and Tel. Co. v. Department
of Pub. Serv. Regulation, 194 Mont. 277, 634 P.2d 181 (1981),
the court held that corporate trade secrets are entitled to
constitutional protection. The court then applied the balancing
test to determine under what conditions trade secrets could be
publicly disclosed.

 In Belth vs. Bennett, 227 Mont. 341, 740 P.2d 638
(1987), the court upheld the constitutionality of Section 33-1-

1 412(5) which provides that the commissioner of insurance "may
2 withhold from public inspection any examination or investigation
3 report for so long as he deems such withholding to be necessary
4 for the protection of the person examined against unwarranted
5 injury or to be in the public interest." The court found that
6 the statute is an alternative expression of the constitutional
7 privacy exception found in Article II, Section 9, of the Consti-
8 tution, and that the commissioner could only invoke the statute
9 when the demand of individual privacy clearly exceeded the
10 merits of public disclosure. The court went on to note that the
11 statute authorizes the commissioner to make an initial decision
12 as to whether the privacy rights outweigh the need for public
13 disclosure. Belth at 346, 740 P.2d at 641.

14 In this case Plaintiffs are not seeking proprietary
15 geological information. DSL's files, however, contain other
16 information which is not proprietary geological information.
17 The file on the Montanore project, one of those requested by
18 Jensen, does not contain any proprietary information.

19 Unlike the statute at issue in Belth, Section 82-4-
20 306, MCA, does not authorize DSL to make an initial determina-
21 tion of whether the privacy rights of the applicant outweigh the
22 need for public disclosure. Rather, the statute requires DSL
23 keep all information confidential unless the applicant gives DSL
24 a waiver. This is in direct conflict with Article II, Section
25

1 9, and the cases which have interpreted it.

2 DSL argues that the legislature has performed the
3 required constitutional balancing test. The Court disagrees for
4 a number of reasons. First, the statute was enacted in 1971,
5 prior to the adoption of the Constitution. Second, the legisla-
6 tive history does not support a conclusion that the legislature
7 applied the balancing test. Third, Article II, Section 9, is a
8 self-executing provision. Allstate Ins. Co. v. City of
9 Billings, 239 Mont. 321, 780 P.2d 186 (1989). Fourth, in
10 applying the balancing test it is necessary to look at "the
11 competing constitutional interests in the context of the facts
12 of each case, to determine whether the demands of individual
13 privacy clearly exceed the merits of public disclosure."
14 Missouliau at 529, 675 P.2d at 971. Fifth, as the court noted
15 in Allstate, the constitutional provisions control the
16 legislature, not vice versa.

17 For the foregoing reasons, the Court concludes that
18 the blanket provision of Section 82-4-306, MCA, which requires
19 DSL to keep all information confidential, is unconstitutional on
20 its face. This does not mean that everything in DSL's files
21 should now be made available for public inspection. Proprietary
22 geological information is still entitled to protection in
23 accordance with Article II, Section 9. In determining whether
24 information in its files should be made available for public
25

1 inspection, DSL should apply the balancing test established by
2 the decisions of the Montana Supreme Court. If after applying
3 the test there is a dispute as to whether information should be
4 released, the affected parties can petition this Court for
5 appropriate relief.

6 The only remaining issue is whether mandamus is the
7 proper remedy. Mandamus lies only to compel the performance of
8 a clear legal duty. Section 27-26-102, MCA; State ex rel. Swart
9 vs. Casne, 172 Mont. 302, 564 P.2d 983 (1977). The issue here
10 is whether there was a clear legal duty on the part of DSL to
11 make the requested files available to Jensen for inspection.
12 Under the facts of this case, the Court concludes that DSL did
13 not have a clear legal duty to make the files available for
14 inspection and therefore mandamus is not the proper remedy.

15 Section 82-4-306, MCA, specifically prohibited DSL
16 from releasing any information in the files. There is also a
17 strong presumption that a statute is constitutionally valid.
18 McClanathan v. Smith, 186 Mont. 56, 65, 606 P.2d 507, 512
19 (1980). Furthermore, "it is the duty of the courts to uphold
20 the constitutionality of legislative enactments if such can be
21 accomplished by reasonable construction." North Cent. Services,
22 Inc. v. Hafdahl, 191 Mont. 440, 444, 625 P.2d 56, 58 (1981).
23 Finally, the Court notes that failure to comply with the secrecy
24 provisions of Section 82-4-306, MCA, is punishable by a fine of
25

1 up to \$1,000. For these reasons, it was not unreasonable for
2 DSL to refuse Plaintiffs' request to review the files.

3 For these reasons,

4 IT IS ORDERED that the foregoing shall constitute the
5 declaratory judgment of this Court and that judgment should be
6 entered in favor of Plaintiffs in accordance with this
7 Memorandum and Order.

8 DATED this 25th day of September, 1992.

9
10
11 
District Court Judge

12 pc: Karl J. Englund
13 Tommy H. Butler
Joe Seifert

14 MEIC.m&o

15 k
16
17
18
19
20
21
22
23
24
25

House Natural Resources Committee
March 12, 1993
Exhibit #7

Exhibit #7 was not transmitted with the minutes.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Natural Resources

COMMITTEE

BILL NO. SB261

DATE 3/12/93 SPONSOR(S) REP. DOLGERT

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE	Amend
John Willard - 319 country club circle, Billings MT 59107	Self		X	
Brooks Martin, Sierra Club P.O. Box 1678 Bozeman MT 59711	Sierra Club, STC	X		
Kenneth Wilson BLAKE J. WORDAL	Nebraska Energy Lewis & Clark County	X		
John Hart 45 Brookside Mesa, MT 59022 Missoula County Commissioner	Missoula County Commission	X		
CHRISTINE MANGIANTINI Box 613 Helena MT 59604 League of Women Voters	League of Wm. Voters	X		
DANIEL W. MCNEER, PLS Corp 1925 PINYON DR. LAUREL MT	MT. ASSN of Reg. Land Surveyors		X	
Steve Manderville	MT Assoc Realtors		X	
Therese McCoy	Helena/LCC Planning Bd.	X		
Wendi Kuts	City of Helena Planning	X		
Doug Olson	Paradise Valley Council			X
Kathy Macfield	City of Helena	X		
Sandi Olsen	State Lands			
George Schunk	Attorney General	X		
Terry Olson	Y.N.R. U.F.W. chief	X		
PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.		X		
Dennis Olson				
NPRC				

**HOUSE OF REPRESENTATIVES
VISITOR REGISTER**

Natural Resources COMMITTEE BILL NO. SB 26
DATE 3/15/93 SPONSOR(S) REP. DOHERTY

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
<i>Jim Lechman</i>	<i>MWF MAN</i>	<i>X</i>	
<i>Tom Hopgood</i>	<i>Mt. Assoc Realtors</i>		<i>✓</i>
<i>Lorna Frank</i>	<i>N.Y. Farm Bureau</i>		<i>X</i>
<i>Janet Ellis</i>	<i>MT Audubon Leg. Fund</i>	<i>X</i>	
<i>Stan Bradshaw</i>	<i>MT. T.U.</i>	<i>✓</i>	
<i>Ted Doxey</i>	<i>mt. Dairy men's Assn.</i>		<i>✓</i>
<i>Brian McNitt</i>	<i>MEIC</i>	<i>✓</i>	
<i>Carla Torgerson</i>	<i>MT. Stockgrowers Assn. MT. Woolgrowers Assn</i>		<i>✓</i>
<i>Jane He Fattan</i>	<i>Mt Petroleum</i>		

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

**HOUSE OF REPRESENTATIVES
VISITOR REGISTER**

BILL NO. SB 104

DATE 3/12/93 SPONSOR(S) REP. GAGG

PLEASE PRINT PLEASE PRINT PLEASE PRINT

[illegible]

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

**HOUSE OF REPRESENTATIVES
VISITOR REGISTER**

House Nat. RES COMMITTEE SB171
DATE 12 Mar. 93 SPONSOR(S) HALLIGAN

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Jim Jensen	MEIC	X	
Stan Bradshaw	MT TEL	✓	
Dennis Olson	NPRC	✓	
John Fitzmaurice	Pogus Gold		✓
WARD STANAWAY	Stillwater Mining		✓
John North	State Lands		
Laurie Olsen	DSC		

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.