

*Handout cm 1/12/04*

# Report On Agenda Item (M)

There should be "NO" public hearing to increase the (4% Illegal Sales Tax) Franchise Fee on public utilities water and sewer service.

The Montana Supreme Court ruled against this (Fee/Tax) December 3, 2003 – the 13<sup>th</sup> District Court called it an illegal sales tax and taxpayers voted "No" in non support for the tax.

If the tax is illegal for MDU, MPC, Qu'est, and Yellowstone Valley Electric, to collect, it's illegal for the Public Utilities Department to collect.

Weird – the intent is for the (PUD) to absorb the increase and not pass it on at this time. If this is true why have the increase at all?

I would support a public hearing to get rid of the 4% tax on PUD water and sewer. Never increase it to 5%!!

Also the PUD and the City of Billings may be required to pay back the 4% tax they illegally assessed consumers over the past few years if challenged in court.

Be mindful the City of Bozeman was assessed several millions of dollars damage from illegally collected impact fees.

This could happen to Billings!!

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**Language from the Supreme Court decision and news headlines from the Billings Gazette are on the back.**

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**EXHIBIT "L"**

# Billings utility fee ruled illegal

HELENA (AP) — A franchise fee that Billings charged utilities using public rights of way for their power lines, cables and pipelines was an illegal tax, the Montana Supreme Court said Wednesday.

The 5-1 decision said the fee, based on a utility's revenue, was nothing more than a sales tax and the law forbids cities from taxing the sale of goods and services, the justices said. The fee went beyond the city's taxing power granted by the Legislature, the court said.

Although the ruling dealt with a fee repealed by Billings voters a year after it was enacted, the court decided to tackle the issue anyway because another city may try to assess a similar fee.

"Given the inclination of Montana's local government leaders to exploit potential new sources of revenue, we anticipate the question of whether the Montana Legislature has checked the power of local governments to charge franchise fees will, in the absence of appellate review, arise again," Justice Bill Leaphart wrote for the court.

Beth Baker, a Helena attorney for the utilities that challenged the fee, said the ruling is important because it puts on notice any cities that may be considering the same type of fee. "This sets the rule in Montana," she

said.

Kristoff Bauer, Billings city administrator, called the decision another blow to the self-governing powers of cities. The court ignored its legal requirement to rule in favor of the city when there are doubts about a city's governing authority, he said.

He said he is not aware of any plans to try to revive the fee in another form.

The Billings City Council adopted the fee in October 2000 as part of an ordinance designed to regulate use of public rights of way in the city. The fee was 4 percent of annual gross revenue from providing local utility and telecommunications services.

Montana Power Co., Montana-Dakota Utilities Co., MDU Resources Group Inc. and Yellowstone Valley Electric Cooperative filed suit and were later joined by Touch America.

District Judge G. Todd Baugh said the fee violated state law, which prohibits self-governing cities from taxing the sale of goods or services.

While the case was being appealed, opponents of the fee put the ordinance to a public vote in November 2001 and it was overturned.

The Supreme Court agreed with Baugh's reasoning, saying the fee has none of the traits that would make it

something other than a tax. Money from the fee was used for a variety of city programs and was not reserved for managing or maintaining the rights of way used by the utilities, the court said.

Since the primary purpose of the fee was to raise money and was based on the sale of utility services within the city, it was simply a sales tax prohibited by state law, the court concluded.

The justices rejected the city's claim that the fee was really rent charged utilities for use of rights of way. Noting the utilities have used the rights of way long before the fee was created, the court said the fee could not be considered rent because utilities received no special benefit from paying it.

Justice Patricia Cotter, the lone dissenter, said the fee was legal because it merely charged utilities for the right to use the streets and alleys for the lines, cables or pipes. Nothing in the law prevents a city from entering into such a contract that levies a fee for a valuable property right.

Those joining Leaphart in the majority were Justices Jim Regnier, James Nelson and Jim Rice. District Judge Michael Prezeau of Libby, sitting in place of Chief Justice Karla Gray, also signed the decision.

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Public utilities and telecommunications corporations with transmission lines, cables, pipelines or other facilities located within public rights-of-way challenge a franchise fee established by ordinance in Billings, Montana. The Thirteenth Judicial District Court, Yellowstone County, held that the franchise fee constitutes an illegal tax. We affirm.

¶2 The issue on appeal is whether a franchise fee based on 4 percent of gross annual revenue generated by each utility that occupies the public rights-of-way within the city constitutes a tax on the sale of utility services?