

FIRE PROTECTION IN MONTANA

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I have prepared this discussion about fire protection in Montana in response to the following request I received from Pat Murdo, Legislative Services. While references are made to statute, Attorney General Opinions and case law, this paper is not, nor is it intended to be, a legal memo.

Mr. Blattie - Could you prepare material illustrating the differences of the four types of fire protection units for rural areas and reasons that someone may choose one over the other?

Below is the statutory authority for the creation of:

- 7-33-2101 - Fire Districts (1895)
- 7-33-2201 - Rural Fire Protection (1945)
- 7-33-2311 - Fire Companies (1885)
- 7-33-2401 - Fire Service Areas (1987)
- 7-33-4101 - Municipal Fire Departments (1889)

I have also included a short discussion of Municipal Fire Departments because municipalities are authorized to enter into agreements with other recognized fire protection agencies so a municipality can provide fire protection in areas outside the incorporated municipal boundaries.

Note that I have added the original enactment dates because I believe it is important to understand the "evolution" of organized firefighting in Montana and will discuss each separately.

FIRE COMPANIES

7-33-2311. Fire companies authorized. (1) Fire companies in **unincorporated towns and villages** are organized by filing with the county clerk of the county in which they are located a certificate in writing, signed by the presiding officer and secretary, providing the date of organization, name, officers, and roll of active and honorary members.

(2) Pursuant to 19-17-112, a fire company shall file with the public employees' retirement board by September 1 of each year:

- (a) the annual certificate for the prior fiscal year;
- (b) the roster of active and inactive members for the current fiscal year; and
- (c) membership cards for all members.

Fire Companies were first authorized in 1885 to provide fire protection and were the first statutorily recognized and authorized fire agencies. Fire Companies were not then, nor are they today "governmental agencies". Fire Companies are private entities. Some may be registered with the Secretary of State as non-profit corporations, while others

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could be registered as regular corporations. Still others are created by governmental agencies for purposes of the Volunteer Firefighter Compensation Act found in Title 19, Chapter 17, Part 1 MCA. And yet others may be simply a group of individuals who have filed the required documentation with the county clerk (7-33-2311(1)). There is no requirement that a fire company be registered as a "corporation" of any kind, however prudence dictates that an independent fire company file and be recognized by the Secretary of State as either a non-profit or for-profit entity to provide the "corporate veil" for liability exposure.

I believe we have all heard the stories of fire companies competing with each other to fight fires. In the early days, firefighting was different than it is today.

Excerpt from: http://www.huffingtonpost.com/tina-dupuy/firefighting-in-the-1800s_b_247936.html

Firefighting used to be a private for-profit industry. In the 1800's, the early days of urbanization, in cities like New York and Baltimore, there were private "clubs" or "gangs" who were in charge of putting out fires. The infamous Boss Tweed started his illustrious political career at a volunteer fire company. The way it functioned was the first club at the scene got money from the insurance company. So, they had an incentive to get there fast. They also had an incentive to sabotage competition. They also often ended up getting in fights over territory and many times buildings would burn down before the issue was resolved. They were glorified looters. It was corrupt, bloated and expensive -- but at least it wasn't the much maligned "government controlled." Around the time of the Civil War, firefighting in big cities was reformed and taken over by the government.

But instead, today firefighters are national heroes. They're organized, quick, competent and with few exceptions pillars of the community. Their duty is to protect people and their property and they do it. They make no profits, are part of the government and they help people 24-hours a day. What started out as a shady gaming of the system where the general public's welfare was at risk is today something of national pride.

So government can do something right. It's happened.

In the early days of Montana, such competing fire companies existed, although it is doubtful that a situation ever existed to the extent described above where fire fighting was a free for all "to the victors go the spoils" affair. Obviously those days are long gone and the fire companies of today exist to serve, and serve to protect, without a for-profit motive.

Fire Companies in municipalities began to fade from existence with the legislative authority to create municipal fire departments in 1889.

In summary, today Fire Companies may be created:

- 7-33-2311 - By any group of individuals wishing to do so by filing documentation with the county clerk and recorder
- 7-33-2105 (1)(c) - By a fire district
- 7-33-2202(2)(b) - By a county governing body

RURAL FIRE DISTRICTS

7-33-2101. Rural fire districts authorized -- petition. (1) The board of county commissioners is authorized to establish fire districts in any unincorporated territory or, subject to subsection (2), incorporated third-class city or town upon presentation of a petition in writing signed by the owners of 40% or more of the real property in the proposed district and owners of property representing 40% or more of the taxable value of property in the proposed district.

(2) (a) Third-class cities and towns may be included in the district upon approval by the city or town governing body.

(b) A third-class city or town may withdraw from a district 2 years after providing to the board of county commissioners notice of intent to withdraw.

The next step in the evolution of firefighting in Montana was the legislative authorization to create rural fire districts in 1895 to provide governmental fire protection in unincorporated areas.

This is still the most frequently used method of providing structural fire protection in rural areas. If a fire district has elected trustees, they have "governing body" status and are largely autonomous from the county government and as such are authorized to request property taxes be levied for the benefit of the district. See: 42 A.G. Op. 80 (1988). The trustees of a rural fire district are granted specific powers in 7-33-2105 MCA, including the power to appoint fire companies for purposes of the Volunteer Fire Fighter Retirement Act.

Additional Statutory Authority for Fire Districts

7-33-2105. Powers and duties of trustees. (1) The trustees:

- (a) shall prepare and adopt suitable bylaws;
- (b) have the authority to provide adequate and standard firefighting and emergency response apparatus, equipment, personnel, housing, and facilities, including real property and emergency medical services and equipment, for the protection of the district;
- (c) **may appoint and form fire companies that have the same duties, exemptions, and privileges as other fire companies for retirement purposes only;**
- (d) shall prepare annual budgets and request special levies for the budgets. The budget

laws relating to county budgets must, as far as applicable, apply to fire districts.

(e) may enter into contracts as provided in 7-33-2107; and

(f) may pledge income to secure financing of the district as provided in 7-33-2109.

(2) All money received by the trustees must be deposited in the county treasurer's office and credited to the fire district.

Related Attorney General Opinions:

Question of Rural Fire District as Taxing Unit: A rural fire district operated by a board of trustees is a taxing unit within the meaning of 15-10-412 (now repealed); however, a rural fire district operated by the county and not by a board of trustees is not a taxing unit. 42 A.G. Op. 80 (1988).

Rural Fire District Not to Incorporate Under Nonprofit Corporation Act: Although the formation and operation of nonprofit corporations are generally controlled by the Montana Nonprofit Corporation Act (Title 35, ch. 2), the particular process relating to the creation and operation of fire districts is specifically mandated by Title 7, ch. 33, part 21. Therefore, a rural fire district may not be established or reestablished and operated under Title 35, ch. 2, in order to avoid personal liability. 43 A.G. Op. 2 (1989).

FIRE SERVICE AREAS

7-33-2401. Fire service area -- establishment -- alteration -- dissolution. (1)

Upon receipt of a petition signed by at least 30 owners of real property in the proposed service area, or by a majority of the owners of real property if there are no more than 30 owners of real property in the proposed service area, the board of county commissioners may establish a fire service area within an unincorporated area not part of a rural fire district in the county to provide the services and equipment set forth in 7-33-2402.

Fire Service Areas were first authorized by the 1987 Legislative Session. It is important to note this date. On November 4, 1986, the Montana Voters passed Initiative I-105, which was codified in Title 15, Chapter 10, Part 4 which limited property taxes to 1986 levels, with exceptions as provided by law. The legislature enacted Senate Bill 71 in 1987 to codify and clarify I-105 but the clear intent was at that time and remains today that increases in property taxes be approved by the voters with certain exceptions, granted by the legislature. Section 1 of I-105 was codified at 15-10-401:

15-10-401. Declaration of policy. (1) The state of Montana's reliance on the taxation of property to support education and local government has placed an unreasonable burden on the owners of all classes of property described in Title 15, chapter 6, part 1.

(2) Except as provided in 15-10-420, the people of the state of Montana declare that it is the policy of the state of Montana that no further property tax increases be imposed on property. In order to reduce volatility in property taxation and in order to reduce taxpayer

uncertainty, it is the policy of the legislature to develop alternatives to market value for purposes of taxation.

It is also very important to note a related Attorney General's Opinion that this property tax freeze is limited to the application of mill levies against assessed property and was, and is, **not applicable to fees for services:**

Property Tax Freeze Inapplicable to Certain Special Districts: Because the overall structure of Initiative No. 105 and Senate Bill No. 71 (Ch. 654, L. 1987) manifests a general intent to regulate only increases in the amount of an individual's property tax derived from application of mill levy and assessed valuation factors, special districts whose assessments and tax levies are based on the value of services actually rendered to a particular piece of property are taxing units excluded from coverage under the property tax freeze. 42 A.G. Op. 21 (1987).

Thus a cynic would argue that the birth of Fire **SERVICE** Areas in 1987 was done as a means to avoid the property tax limitation and to provide a funding mechanism, outside of property taxes, based upon a fee for service.

A more pragmatic explanation exists. Prior to the authorization to create Fire Service Areas, there was no mechanism in place where an area outside of an incorporated city limit could be provided fire protection by the municipal department or in some cases a nearby fire district with the property owners being assessed for that service. Often an area might be as small as a subdivision so it made no sense to create a fire district to provide fire protection. Often these areas adjoined a municipality that was willing to provide fire protection but there was no mechanism for these property owners to pay for the cost of the service. These areas often only contained homes so it made sense to authorize a fee on structures to be assessed with the funds then being transferred to the fire agency that actually provided fire protection services.

Additional Statutory Authority for Fire Service Areas

7-33-2401. Fire service area -- establishment -- alteration -- dissolution. (1) Upon receipt of a petition signed by at least 30 owners of real property in the proposed service area, or by a majority of the owners of real property if there are no more than 30 owners of real property in the proposed service area, the board of county commissioners may establish a fire service area within an unincorporated area not part of a rural fire district in the county to provide the services and equipment set forth in 7-33-2402.

(2) To establish a fire service area, the board shall:

(a) pass a resolution of intent to form the area, with public notice as provided in 7-1-2121;

(b) hold a public hearing no earlier than 30 or later than 90 days after passage of the resolution of intent;

(c) at the public hearing:

(i) accept written protests from property owners of the area of the proposed area; and

(ii) receive general protests and comments relating to the establishment of the fire

service area and its boundaries, rates, kinds, types, or levels of service, or any other matter relating to the proposed fire service area; and

(d) pass a resolution creating the fire service area. The area is created effective 60 days after passage of the resolution unless by that date more than 50% of the property owners of the proposed fire service area protest its creation.

(3) Based on testimony received in the public hearing, the board in the resolution creating the fire service area may establish different boundaries, establish a different fee schedule than proposed, change the kinds, types, or levels of service, or change the manner in which the area will provide services to its residents.

(4) The board of county commissioners may alter the boundaries or the kinds, types, or levels of service or dissolve a fire service area, using the procedures provided in subsection (2). The board of county commissioners shall alter the boundaries of a fire service area to exclude any area that is annexed by a city or town, using the procedures provided in subsection (2). Any existing indebtedness of a fire service area that is dissolved remains the responsibility of the owners of property within the area, and any assets remaining after all indebtedness has been satisfied must be returned to the owners of property within the area.

7-33-2404. Financing of fire service area -- fee on structures -- fee on undeveloped land. (1) In the resolution creating the fire service area and by resolution as necessary after creation of the fire service area, the board of county commissioners shall establish a schedule of rates to be charged to owners of structures and owners of undeveloped land that are benefited by the services offered by the fire service area.

As originally enacted, fees were established for funding structure protection in rural areas only. A subsequent amendment in 2007 added the provision for a fee to be assessed on undeveloped land. This fee was based upon acres protected and included a \$250 per landowner cap on the per acre fee as a means to protect larger landowners from unfairly carrying most of the burden. The fee on undeveloped land is to be used for wildland fire protection. The fire service area is extinguished upon annexation of the area into a municipality.

7-33-2404. Financing of fire service area -- fee on structures -- fee on undeveloped land. (1) In the resolution creating the fire service area and by resolution as necessary after creation of the fire service area, the board of county commissioners shall establish a schedule of rates to be charged to owners of structures and owners of undeveloped land that are benefited by the services offered by the fire service area.

(2) (a) The **rates for structures** must be applied on a fair and equal basis to all classes of structures benefited by the fire service area. The fee charged to owners of structures is intended to be primarily used for structural fire prevention and suppression.

(b) The **rates for undeveloped land** must be applied on a fair and equal basis to all classes of undeveloped land benefited by the fire service area. Undeveloped land does not include land located under structures subject to a fee under subsection (2)(a). The excluded land may not exceed 1 acre. The fee charged to owners of undeveloped land is intended to be primarily used for wildland fire prevention and suppression. **The fee may not exceed 15 cents an acre up to a maximum of \$250 for undeveloped land under**

single ownership. The fee may not be assessed on undeveloped land for which the owner pays a fee or tax to another public agency for wildland fire prevention and suppression.

(3) The board of county commissioners shall collect the funds necessary to operate the fire service area by charging the area rate as a special assessment on the owners of structures and undeveloped land and shall collect the assessments with the general taxes of the county. The assessments are a lien on the assessed property.

(4) The board of county commissioners or the trustees, if the fire service area is governed by trustees under 7-33-2403, may pledge the income of the fire service area to secure financing necessary to procure equipment and buildings to house the equipment. The outstanding amount of the indebtedness may not exceed 1.1% of the total assessed value of taxable property, determined as provided in 15-8-111, within the area, as ascertained by the last assessment for state and county taxes prior to the incurring of the indebtedness.

(5) If a fire service area is reduced or eliminated by annexation of all or a portion of the fire service area into a municipality, then the county commissioners or trustees of the fire service area shall notify the annexing municipality in order to prevent the property owners of the area to be annexed from assuming financial responsibility to both the municipality and the fire service area.

As earlier stated, fire service areas were created as a funding mechanism (arguably to circumvent I-105) and were not intended to actually operate as a fire protection agency, however today there are several fire service areas that do provide direct fire suppression services as authorized by a 1991 amendment to 7-33-2402.

7-33-2402. Area services. (1) A fire service area created pursuant to 7-33-2401 may provide residents of the area with adequate and standard:

- (a) (i) fire and emergency response equipment, personnel, facilities, and maintenance, for a fire service agency providing service to the area; or
- (ii) fire protection by contracting for the services of a fire service agency; and
- (b) emergency medical services and equipment, licensed by the department of public health and human services, and related personnel, facilities, and maintenance.

(2) A fire service area may, pursuant to 50-61-102, submit a fire code and a plan for enforcement to the department of justice in order to be certified for local enforcement. However, an appointed board of trustees of a fire service area shall obtain approval of the county commissioners prior to submitting a fire code and a plan of enforcement to the department of justice.

Compiler's Comments:

1991 Amendment: At end of introductory clause inserted "adequate and standard"; in (1)(a), at beginning after "fire", inserted "and emergency response", after "equipment" inserted "personnel", and substituted "facilities" for "housing for the equipment"; inserted (2) concerning emergency medical services and equipment, personnel, facilities, and maintenance; and made minor changes in style.

RURAL FIRE PROTECTION

7-33-2201. Authority of county governing body to protect range, farm, and forest resources. For the purpose of protection and conservation of range, farm, and forest resources and of the prevention of soil erosion, the county governing body **may** perform the functions provided in this part.

A Board of County Commissioners is granted discretionary authority to provide fire protection, limited to wildland fire protection.

In some counties, the county provides a county fire department to provide wildland fire protection while in others, the county enters into an agreement with other fire agencies such as fire companies and fire districts to provide this protection.

To fulfill its **authority** (NOTE: not obligation) under 7-33-2201, to protect the **range, farm and forest**, (NOTE: DOES NOT include structure protection) some counties, levy a county-wide (outside municipalities) levy.

Part Attorney General Opinions:

County Rural Fire Protection Not Required: County governing bodies have discretion as to whether they provide rural fire protection under this part. However, if they undertake to provide such services, they are required to comply with 7-33-2202. 42 A.G. Op. 109 (1988).

Provision of Fire Protection Services Outside City Limits: A city may contract with entities to provide fire protection services outside the city limits. 42 A.G. Op. 80 (1988).

In some counties, the county has a county volunteer fire department to provide wildland fire protection while in others, the county enters into agreements with recognized fire protection agencies within the county to provide wildland fire protection, as authorized in 7-33-2202.

Yellowstone and Stillwater counties are two such examples. Prior to 2001, a county was authorized to levy up to two mills or \$15,000, whichever was higher for this function. HB 124 (2001) eliminated that specific authority and the authority was rolled into the overall authority and property tax limitation in 15-10-420.

The contracts in those two counties are based upon a per-acre allocation and are paid to fire districts, fire service areas and rural fire companies that provide the service for the county.

Additional Statutory Authority for Rural Fire Protection

7-33-2202. Functions of county governing body. (1) The county governing body, with respect to rural fire control, shall carry out the specific authorities and duties imposed in this section.

(2) The governing body shall:

(a) provide for the organization of volunteer rural fire control crews; and

(b) provide for the formation of county volunteer fire companies.

(3) The governing body shall appoint a county rural fire chief and as many district rural fire chiefs, subject to the direction and supervision of the county rural fire chief, that it considers necessary.

(4) Pursuant to 76-13-105(3), **the county governing body shall**, within the limitations of 7-33-2205, 7-33-2206, 7-33-2208, and 7-33-2209, **either:**

(a) **directly protect** from fire land in the county that is not in a wildland fire protection district, as provided in 76-13-204, or under the protection of a municipality, state agency, or federal agency; or

(b) **enter into an agreement** for wildland fire protection with a recognized agency, as that term is defined in 76-13-102.

(5) The county governing body may enter into mutual aid agreements for itself and for county volunteer fire companies with:

(a) other fire districts;

(b) unincorporated municipalities;

(c) incorporated municipalities;

(d) state agencies;

(e) private fire prevention agencies;

(f) federal agencies;

(g) fire service areas;

(h) governing bodies of other political subdivisions in Montana; or

(i) governing bodies of fire protection services, emergency medical care providers, and local government subdivisions of any other state or the United States pursuant to Title 10, chapter 3, part 11.

(6) If the county governing body has not concluded a mutual aid agreement, the county governing body, a representative of the county governing body, or an incident commander may request assistance pursuant to 10-3-209.

MUNICIPAL FIRE PROTECTION

7-33-4101. Fire department authorized and required. In every city and town of this state there **must be a fire department**, which must be organized, managed, and controlled as provided in this part except that a third-class city or town may contract for fire protection services or consolidate its fire department with another fire protection provider created under this part.

Municipal Fire Departments were first authorized in 1889 and became mandatory for every incorporated municipality in 1937.

Case Notes:

Authority to Abolish Volunteer Fire Department: This section (7-33-4105) and 7-33-4105 together clearly imply that a city government could abolish its volunteer fire department when in its judgment a paid department should be established in lieu thereof. State ex rel. Casey v. Brewer, 107 M 550, 88 P2d 49 (1939).

Today municipal fire protection is provided in one of four different ways:

- Paid Fire Departments
- Paid Departments that also include volunteers
- Volunteer fire departments
- Agreements with other recognized fire protection agencies

Case Notes:

Fire Department Operated in Proprietary Capacity by City: Before amendment of this section in 1937, it was held that under this section and 7-33-4201, 7-33-4202, and 7-33-4204, a city was empowered but not compelled to maintain a fire department. The city operated its fire department as a proprietary function, except when engaged in extinguishing or going to or from the scene of a fire or testing equipment for such occasions, when it was exercising governmental functions. State ex rel. Kern v. Arnold, 100 M 346, 49 P2d 976, 100 ALR 1071 (1935).

Section 7-33-4109(1) provides that *in addition to a paid department, the city council, city commission, or other governing body in **cities of the second class** may make provision for a volunteer fire department.* Below is an applicable Attorney General's Opinion:

Volunteer Firemen: A first-class city shall not supplement its paid fire department with volunteer firemen while a second-class city may, and such volunteer firemen are entitled to all benefits provided in Title 19, ch. 11, part 6 (renumbered Title 19, ch. 18, part 6), except for the service pension provided therein. 35 A.G. Op. 67 (1974).

The reasons one method of fire protection is chosen over another are as varied and different as the communities they serve.

Fire Companies are often chosen because they are the path of least resistance. The process to establish a fire company requires no petition and no voter approval.

Because a fire company has no taxing authority, taxpayers in an area are often more supportive of the creation of a fire company than they would be of either a fire district or fire service area and are willing to accept a lower level of service which is inherent because lower funding availability.

Fire companies are often viewed as wildland fire fighting agencies with very limited structural firefighting capability due to lack of funding for structural firefighting equipment. Fire companies often have very limited structural firefighting training.

Fire Districts are chosen as the method to provide fire protection in many areas because residents want a higher level of service and are willing to have property taxes assessed against their property to have that service. Because of increased availability of funding through property taxes residents also have a higher expectation of services provided. Some fire districts have firefighting capabilities that are comparable to many municipal fire departments.

Fire Service Areas are in some cases the preferred method of providing fire protection where structural protection is desired but the area may not be of a sufficient size to warrant the creation of a fire district. Fire Service Areas provide a means to provide funding through assessments on structures to be used to contract with a recognized fire protection agency, most often a municipality for structural protection. Recognizing that urban sprawl has created larger tracts of property as home sites, authority to collect a fee assessment on a per acre basis, limited to \$250 per owner, in addition to the fee on structures, was recently authorized by the legislature.

Rural Fire protection is often used in areas where fire protection is limited to whatever level of wildland protection is provided by the county directly. Structure protection is not included although if a county has a county fire department, that department will generally respond to structure fires with a role of primarily preventing fire spreading to other buildings or wildlands. As earlier discussed, some counties contract with other recognized fire protection agencies to provide wildland fire protection.

There are vast areas of Montana where fire protection is non-existent or limited to wildland fire protection provided at a level determined by each county, either directly or through agreements with recognized fire protection agencies.

As we search for a means to provide Workers Compensation Coverage for volunteer firefighters, we need to be mindful that these volunteers may be fire company volunteers, county volunteers, fire district volunteers, fire service area volunteers or municipal volunteers.

This document is not intended to be all-inclusive, covering every aspect of fire protection in Montana. I would like to encourage readers to review fire protection statutes contained in Title 7, Chapter 33 MCA as well as *The Price of Flame*, the final report of the Fire Suppression Interim Committee issued in September 2008.